Nos. 89-1027 and 89-1028

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NORFOLK AND WESTERN RAILWAY COMPANY and
SOUTHERN RAILWAY COMPANY,
Petitioners,

v.

AMERICAN TRAIN DISPATCHERS' ASSOCIATION, *et al.*,
Respondents.

CSX TRANSPORTATION, INC.,
Petitioner,

v.

BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
Respondents.

**On Writs of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF FOR UNION RESPONDENTS

WILLIAM G. MAHONEY
(Counsel of Record)
JOHN O'B. CLARKE, JR.
HIGHSAW, MAHONEY & CLARKE, P.C.
1050 17th Street, N.W.
Suite 210
Washington, D.C. 20036
(202) 296-8500
Attorneys for Union Respondents

Date: November 9, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether Interstate Commerce Commission orders authorizing railroads to consummate 49 U.S.C. 11343(a) transactions exempt railroads participating therein from collective bargaining agreement obligations by virtue of the provisions of 49 U.S.C. 11341(a)?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

BRIEF FOR UNION RESPONDENTS

On March 26, 1990, this Court granted the petitions of CSX Transportation, Inc. (CSXT) and Norfolk and Western Railway Company ("N&W") and Southern Railway Company ("Southern," jointly "NS") for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the decision of that court in *BRC v. ICC*, 880 F.2d 562 (Pet. App. 1a-28a).[1] This brief is respectfully submitted by the Brotherhood of Railway Carmen ("BRC") and the American Train Dispatchers' Association ("ATDA") ("Union Respondents"), in opposition to the briefs filed by the Petitioners and by the Federal Respondents, United States and Interstate Commerce Commission ("ICC" or "Commission").[2]

STATUTES INVOLVED

Section 11341(a) of the Interstate Commerce Act ("ICA" or "Act"), 49 U.S.C. § 11341(a), the provision upon which the court of appeals based its decision, is but one of several interdependent provisions of subchapter III of Chapter 113, which must be read and applied as a whole. All of the provisions of subchapter III were, prior to recodification, subsections and subparagraphs of one section of the Act.[3]

COUNTERSTATEMENT OF THE CASE

These cases involve the extent of Commission authority, if any, under section 11341(a) of the Act, to modify or eliminate the statutory and contractual rights of rail-

---

[1] References to "Pet. App." are to the appendix to the petition in No. 89-1028.

[2] The United States did not participate in the proceedings below and the Commission did not seek review by this Court of the court of appeals decision.

[3] Section 11341(a) (formerly § 5(12), 90 Stat. 63); section 11343(a) (formerly § 5(2)(a), 63 Stat. 486); section 11343(b) (formerly § 5(b), *Id.*); section 11344(b)(1) (formerly § 5(2)(c), 63 Stat. 485); section 11344(c) formerly § 5(2)(b), *Id.*); and section 11347 (formerly § 5(2)(f), 90 Stat. 65). *See* App. A.

road employees whose employers in 1980 and 1982 placed their railroads under the separate common controls of Norfolk Southern Corporation ("NSC") and CSX, Incorporated ("CSX") after obtaining ICC authority to do so.

A. The CSX, Inc. Control And Merger And The Norfolk Southern Corp. Control

In 1980, the ICC authorized CSX to obtain control of the railroads then controlled by the Chessie System and the railroads controlled by Seaboard Coast Line Industries.[4] *CSX Corp.—Control—Chessie Sys. & Seaboard Coast Line Indus.*, 363 I.C.C. 521 (1980) (*"CSX Control"*). That control was consummated in 1980 when CSX exercised the authority granted and assumed control and management of the operation and properties of the two railroad systems.

In 1982, the Commission authorized the NSC to assume control of the N&W, a product of numerous earlier mergers involving N&W, Virginian Railway, Wabash Railroad, and Nickelplate Railroad, among others, and the Southern Railway System and its numerous railroad subsidiaries. NSC effected the authority granted and assumed control and management of the operations and properties of N&W and Southern in 1982.

In order to make their respective controls of these railroads operationally and economically efficient, CSX and NSC had to have connections constructed between them, have these railroads operate over each others tracks,

[4] Chessie System controlled the Chesapeake and Ohio Railway Company ("C&O"). Seaboard Coast Line Industries controlled the Seaboard Coast Line Railroad Company ("SCL"), which had resulted from a merger of the Atlantic Coast Line Railroad Company ("ACL"), the Seaboard Air Line Railroad Company ("SAL") in 1962, and the Louisville and Nashville Railroad Company ("L&N"), among others. In December, 1982, SCL merged with L&N to form the Seaboard System Railroad, Inc. ("SSR"). In July, 1986, SSR changed its name to CSX Transportation, Inc. and in 1987, after the transfers giving rise to the *ATDA* case, C&O merged into CSXT, a petitioner herein.

jointly use some tracks, coordinate certain operations and, abandon lines that would become superfluous after common control was effected. The railroads which would become subject to CSX's control filed some 17 separate applications and the future subsidiary railroads of NSC filed some 6 applications for the required ICC approval of these merger objectives, all of which were granted along with the basic control applications filed by CSX and NSC.[5] A descriptive list of these separate applications is set forth in the ICC's summary of its decisions in these cases at 363 I.C.C. 521-25 (CSX) and 366 I.C.C. 173-74 (NSC).

In order to demonstrate to the Commission that their respective applications were "consistent with the public interest" as required by section 11344(c), 49 U.S.C. § 11344(c), CSX and NSC presented evidence of their intentions regarding future operations and consolidations that would improve service and efficiency. Neither NSC nor CSX requested the Commission to approve any of the proposed changes except those changes noted above for which prior ICC approval was required by the ICA; nor were they bound to carry out any of changes which they presented in support of their applications.[6]

B. The Transfer Of SCL Work And Employees At Waycross, Georgia To C&O At Raceland, Kentucky; The Transfer Of N&W Work And Employees At Roanoke, Virginia To Southern At Atlanta, Georgia

The employees of all of the railroads involved in the subject transfers maintained through their union repre-

[5] No applications were submitted by any party seeking ICC approval to consolidate shops, yards, offices or other similar facilities, the activities complained of in the instant cases.

[6] The Commission has long held that its orders are permissive and when effected an applicant is bound only to adhere to the conditions attached to those orders. *See, e.g., Rio Grande Industries—Purchase & Trackage Rights—Chicago, Missouri & Western Ry. Co. Line Between St. Louis, MO and Chicago, IL*, 5 I.C.C.2d 952 (1989); *Tex. & N.O.R. Co. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151, 159 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963); *Valdosta Southern R.R.—Purchase*, 282 I.C.C. 705, 711 (1952); *Gulf, Mobile & Ohio R.R. Co.—Purchase*, 267 I.C.C. 265, 269 (1947).

sentatives collective bargaining agreements with their respective employers and, in the case of the SCL employees, maintained a separate agreement, known as the "Orange Book", from the color of its cover, which provides each employee covered by its provisions with a guaranteed income for the remainder of his or her working life. (Pet. App. 54a-55a.) Moreover, the protected employees were guaranteed that neither they nor their work would be transferred beyond the boundaries of the SCL system. *Id.* In exchange for those protections, SCL was granted the right to transfer work and employees within the merged ACL-SAL (SCL) system but not beyond it. (Pet. App. 83a.)

In August 1986, CSXT, purportedly pursuant to Article I, Section 4 of the *New York Dock* conditions[7] served notice on the Brotherhood of Railway Carmen that the SCL freight car heavy repair shop in Waycross, Georgia would be closed on December 31, 1986 and that the freight car heavy repair work as well as certain storeroom work at Waycross would be transfered to the C&O's Raceland, Kentucky repair facility and made subject to the C&O collective bargaining agreement. (Pet. App. 55a.) CSXT proposed to abolish 121 positions in the carman craft at Waycross and to establish 99 positions in the carmen craft at Raceland. All of the carman craft employees were subject to a collective bargaining agreement ("CBA") with CSXT and about one-half of those employees were also entitled to the protections of the "Orange Book," which, as noted above, prohibited the transfer of the work and the protected employees to Raceland. (*Id.*)

About two weeks after CSXT's intended transfer, N&W notified the American Train Dispatchers' Association of its intention to transfer all work of locomotive power distribution and assignment from the N&W at

[7] Article I, Sections 1(a), 2, 3 and 4 of the *New York Dock* conditions, 360 I.C.C. 60, 84 (1979), are set forth in Appendix B to this brief.

Roanoke, Virginia, where employees were represented by ATDA, to the Southern in Atlanta, Georgia, where the employees performing that work were unrepresented, being considered management personnel by Southern. The N&W employees would be considered for work in Atlanta. (J.A. 8-10).[8]

C. The Arbitration Awards

The parties were unable to reach agreement under section 4 of the *New York Dock* conditions. The respective disputes between the parties were submitted to arbitrators.[9] The BRC and the ATDA disputed the jurisdiction of the arbitrators to change the wages, rules or working conditions of employees or to eliminate any of their existing Railway Labor Act, 45 U.S.C. § 151, *et seq.* ("RLA") or CBA rights. (J.A. 12-13; Pet. App. 61a-62a.) Regarding the separate Orange Book protection applicable to half of the affected carman employees at Waycross, BRC argued that the arbitrator had no jurisdiction to affect any of the substantive rights provided employees by that agreement, and that "section 3 of the *New York Dock* conditions absolutely preserves workers' rights and benefits under existing protection agreements." (Pet. App. 64a.)

On behalf of the N&W employees it represented, the ATDA argued that the ICC could not eliminate the CBA rights or the collective bargaining rights the employees had established through their representation by ATDA by removing them and their work to a railroad on which they had no such established rights. (J.A. 19.)

The *Carmen* award was issued in March 1987 followed by the *ATDA* award in May 1987.

Holding that an arbitrator under section 4 was a "quasi-judicial extension of the ICC" and therefore

[8] References to "J.A." are to the consolidated Joint Appendix filed in these cases.

[9] Technically, the disputes were submitted to three-person committees: two partisan members and a neutral. The neutral is the effective arbitrator in such arrangements.

"must strictly follow the ICC's interpretation of its own authority" (Pet. App. 80a), the *Carmen* case arbitrator followed the ICC's decision in the *DRGW* case [10] which for the first time had held that section 11341(a) granted the Commission "expansive and self-executing authority to immunize an approved transaction from the Railway Labor Act and existing collective bargaining agreements to the extent the statute and terms of the agreements bar implementation of the transaction." (Pet. App. 80a.) Indeed, "[a]ccording to the ICC, Section 11341(a) insulates a transaction from all legal obstacles preventing or impeding effectuation." (*Id.*) The arbitrator then held that CSXT could transfer work and employees from the CSXT and its agreement to the C&O and its agreement because to permit the preservation of the CSXT employees' agreement rights, including their Orange Book guarantee that their work would not be transferred, "would for all practical purposes block the transaction," *i.e.*, the 1986 transfer of work and employees to the C&O. (Pet. App. 85a.) [11]

The arbitrator, however, felt that some of the employees' Orange Book rights could be protected without impeding the completion of the transfer. He found that without the right granted by the employees in 1962 to the then newly-merged SCL to "transfer work and workers throughout the merged (SAL-ACL) system . . . the point seniority terms of the [collective bargaining] working agreement would have restricted the Carriers from

---

[10] *Denver and Rio Grande Western Railroad Co.—Trackage Rights —Missouri Pacific Railroad Co.*, Finance Docket No. 30000 (Sub-No. 18) (October 19, 1983) (not printed). A copy of this unpublished ICC decision is attached to CSXT's Brief, filed February 21, 1989, in D.C. Cir. No. 88-1724.

[11] It is the Union Respondents' position that this is an erroneous use of the term "transaction" as found in sections 11341(a) and 11343. The term as used in the statute does not include changes made by a merged or commonly controlled railroad following, and as a result of, an approved and consummated statutory "transaction". *See infra*, 24-26, 29-30, 31-32.

moving employees." (Pet. App. 83a.) [12] The arbitrator concluded that the Orange Book prohibited the movement of work and workers beyond the limits of the former SCL property and therefore would bar transfers of work and employees to the C&O at Raceland, KY thereby "effectively thwart[ing] . . . [the] transfer[]." (*Id.* 83-84a.) He held that the employees' rights "must be subordinated to the Carriers' right to engage in the authorized *New York Dock* transaction" [13] by permitting the transfer of their work (*id.* 84a); but, he prohibited the transfer of the "Orange Book" employees because recognition of that particular agreement right of the employees would "only slightly impair the transaction." (*Id.*)

Some two months following issuance of the *Carmen* award, a second arbitrator issued his decision and award in the *ATDA* case. He noted that between "1981 and 1983 at least five arbitrators ruled that the ICC did not desire that changes of rates of pay, rules or working conditions, or of representation under Railway Labor Act, occur through arbitration under Section 4 of the New York Dock conditions." (*Id.*) He then proceeded to quote extensively from the Commission's 1985 *Maine Central* decision [14] in which the ICC held that it "is that [ICC] order, not RLA or WJPA, that is to govern employee-management relations in connection with the approved

---

[12] The railroads' practice of negotiating agreements such as the Orange Book and other similar agreements (*see* footnote 26, *infra*) to overcome the transfer restrictions in CBA's has been rendered unnecessary by the Commissions' expansive interpretation of its authority under section 11341(a).

[13] The arbitrator, following the ICC's rulings, viewed the 1986 transfer of work as having been authorized by the Commission rather than simply a result of the 1980 statutory transaction (the control) authorized by the Commission. *See infra*, 26, 31-32.

[14] *Maine Central R.R.—Exemption from 49 U.S.C. 11342 and 11343*, Finance Docket No. 30522 (September 16, 1985) (not printed), *aff'd per curiam sub nom. Railway Labor Executives' Association v. I.C.C.*, 812 F.2d 1443 (D.C. Cir. 1987) (Table). A copy of this unpublished ICC decision is attached as Addendum C to ATDA's Brief, filed March 21, 1989, in D.C. Cir. No. 88-1694.

transaction." (J.A. 17.) [15] The arbitrator also quoted that portion of the Commission's decision in the *Maine Central* case in which it made clear its intent to use section 4 of the *New York Dock* conditions to compel arbitration of new collective bargaining agreements (*id.*):

> Such a result [governance of labor relations by ICC orders] is essential if transactions approved by us are not to be subjected to the risk of nonconsummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement those transactions.

Holding that he derived his authority from the ICC; that "it is clear that the ICC believes that its order supercedes Railway Labor Act protection"; and, that the "conclusion is inescapable" that in the view of the ICC, "the inconsistencies between Sections 2 and 4 of the New York Dock conditions are to be resolved in favor of Section 4," the arbitrator held that the N&W could transfer the work and the employees to the Southern at Atlanta. (J.A. 19.) [16]

The arbitrator also held that depriving the affected employees of their existing collective bargaining representative as well as their collective bargaining agreement "does not change the rights of the individual em-

[15] "WJPA" refers to the "Agreement of May 1936, Washington, D.C." between all of the unions and most of the railroads providing protection for employees affected by railroads' "coordination" of facilities. It is the protective formula upon which all later protective formulae have been based and is still in effect.

[16] Union Respondents had contended that no inconsistency existed between Sections 2 (preservation of collective bargaining and contract rights) and 4 (arbitration of implementing agreements providing for the selection of forces and assignment of employees) of the *New York Dock* conditions when those provisions are applied in accordance with industry practice between 1940 and 1983. The work forces are selected to perform the coordinated or consolidated work and employees were assigned to those work forces. Their individual rights under their existing agreements, however, were preserved to them until changed by voluntary agreement.

ployees" (*id.* 19) because once on the property of Southern they could petition the National Mediation Board to *reestablish* their right to have ATDA represent them. (*Id.* 20.) [17] The arbitrator imposed the implementing agreement proposed by the N&W transferring the work and the employees to Southern without their existing agreement or representation rights.

D. The Commission Proceedings

Both awards ultimately were appealed to the Commission. In the *Carmen* case, the Commission held that the arbitrator had correctly interpreted the Commission's view of its authority and affirmed the arbitrator on that point. (Pet. App. 43a.) However, it concluded that the arbitrator had committed "egregious error" in holding that the employees covered by the Orange Book could not be required to transfer to Raceland, Kentucky. (*Id.*) The "slight impairment of the transaction" found by the arbitrator was held to be an unacceptable standard as it would "permit[] a provision of a collective bargaining agreement to conflict with the implementation of an approved transaction" and thereby "effectively undercut the Commission's authorization of the transaction here." (*Id.* 43a-44a.) The Commission concluded that the evidence did not support the arbitrators finding of "slight impairment" of the transaction and reversed that finding, remanding the case to the arbitrator for a further review consistent with the Commission's decision.[18] (*Id.* 44a-45a.)

In reviewing the *ATDA* award, the Commission relied upon its decision in *Maine Central* and affirmed the

[17] The arbitrator also concluded that representation rights obtained through recognition by a railroad employer, as were ATDA's rights here, were somehow inferior to such rights obtained by election. The National Mediation Board disagrees. *Grand Trunk Western R.R. Co.—Merger*, 17 NMB 282, 303 (1990).

[18] The only evidence relied upon by the Commission to reach this conclusion was that related to a reduction in cost savings and operating efficiencies, neither of which it quantified. (*Id.* 44a.)

arbitrator's holding that the terms of its 1982 order approving the NSC control of N&W and Southern "and specifically the compulsory, binding arbitration required by Article I, Section 4 of *New York Dock*, took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements" and any "action taken under our control authorization is immunized from conflicting laws by section 11341(a)." (No. 89-1027, Pet. App. 35a.) The Commission thought the arbitrator's award "somewhat confusing" on the issue of loss of representation but concluded the National Mediation Board could determine whether ATDA had any representative status on Southern. (*Id.* 38a.)[19]

E. The Court Of Appeals Decision

The Union Respondents sought review of the Commission's decisions in the court of appeals which heard the cases simultaneously and issued a consolidated opinion. (Pet. App. 1a-28a.)

The court held that "§ 11341(a) of the Act does not grant the ICC its claimed power to override provisions of a CBA between a carrier and its employees", reversed the ICC's decision and remanded the cases "with respect to the ICC's RLA holdings in order that the agency may determine whether further proceedings are necessary." (*Id.* 26a.)

F. The ICC Decision On Remand

Just nine days after the court of appeals issued its decision in the instant cases, the Commission issued a decision of major significance in the application and interpretation of section 11341(a) in a case involving the purchase by a shortline railroad of 102 miles of CSXT line in

---

[19] The issue of whether the employees' pre-existing right to representation by the ATDA had been preserved as *New York Dock*, Article I, Section 2 and 49 U.S.C. § 11347 requires, was not addressed by the ICC.

Florida.[20] The Commission held that this Court's *P&LE* decision (*see infra*, n.36) could not "be properly applied" to cases arising under section 11343(a), 49 U.S.C. § 11343(a), in which protection is afforded employees; that it did "not dispute the validity" of the lower courts' limited holding; that it had never "relied upon . . . § 11341(a) . . . to require that agreements be modified"; and that its authority to override CBA's was derived from section 11347.[21]

The Commission's decision following remand of these cases from the court of appeals is reported at 6 I.C.C.2d 715 ("remand decision"). It followed an order reopening the proceeding for public comment, a 3-hour oral argument held on January 4, 1990, before the full Commission by all interested parties, the submission of extensive documentation by rail labor of the legislative, judicial and administrative history of employee protection since its inception in the railroad industry and, the filing of post-argument briefs by the railroad management interests participating. (*Id.* 717-718.)[22]

In its remand decision, the Commission adhered to the ruling of the court of appeals that it was not authorized by section 11341(a) to override provisions of collective bargaining agreements, but concluded that such authority was unnecessary in any event since that authority had been afforded the Commission by Congress' inclusion of the employee protective provisions of section 5(2)(f)

---

[20] *Brandywine Valley Railroad Company—Purchase—CSX Transportation, Inc. Lines in Florida*, 5 I.C.C.2d 764 (decided August 3, 1989; served August 11, 1989).

[21] *Brandywine*, 5 I.C.C.2d at 772 n.5. The Commission now disputes the validity of the court of appeals' decision and contends that its "absolute authority" over labor management relations in cases subject to section 11343 of the Act is derived from both section 11341(a) and section 11347. *See, infra* 22.

[22] CSXT, NS, Union Pacific Railroad, Missouri Pacific Railroad, Conrail, Atchison, Topeka & Santa Fe Railway and the National Railway Labor Conference (rail management's national negotiating arm) presented oral argument.

in the 1940 Act (*id.* 750-751) and held that section 11341(a) empowered the ICC "to exempt mergers and consolidations from the RLA at least to the extent of our authority under § 11347." (*Id.* 754.)

The Commission's review of history compelled it to "concede that our assertion of this power is fairly recent, as both RLEA (Outline, 4-9) and the *Carmen* court assert." (*Id.* 755.)[23] It admitted that its decisions in 1983 (*DRGW*) and 1985 (*Maine Central*) had contributed to a deterioration of labor-management relations which had not theretofore existed in this area. (*Id.* 745-746.) The Commission noted that "a relatively harmonious working relationship when implementing ICC-approved consolidations [had existed] for almost forty years" prior to its 1983 and 1985 decisions and the inclusion of Section 2 in *New York Dock* in 1979. (*Id.* 745.)[24]

The Commission interpreted Section 2 of *New York Dock* as merely providing employees with "the opportunity to bargain collectively over their basic and continuing conditions of employment, as contemplated by the RLA" but permitting modification of collective bargaining agreements "when necessary to complete an approved merger or consolidation." (*Id.* 749.) To support that interpretation the ICC cited no evidence or authority, but relied solely upon assumptions of what "must have happened": the 1940-1980 arbitrators "*must have defined* them [the terms 'selection of forces' and 'assignment of

[23] Reference is to the Outline of Oral Argument submitted by rail labor at the oral argument of January 4, 1990, together with supporting documentation entitled "Materials in Aid of Oral Argument."

[24] The ICC's conclusion that the 1979 inclusion of Section 2 of the *New York Dock* conditions, as required by section 402(a) of the Railroad Revitalization and Regulatory Reform Act of 1976, P.L. No. 94-210, 90 Stat. 31 ("4R Act"), contributed to labor unrest is based upon the assumption that the inclusion of section 2 added something new to the law instead of simply confirming the law as it had always been applied to that time.

employees'] broadly enough to include contract changes involving movement of work (and *probably* employees) as well as adjustments in seniority" (*id.* 721);[25] "[i]t *appears* that arbitrators, management and labor developed approaches in the 1940-1980 period for resolution of the inevitable conflicts with CBAs that permitted the carrying out of the transaction while maintaining labor peace" (*id.* 721-722);[26] between 1940 and 1980 "the disruptive effect on labor *appears* to have been successfully handled through WJPA-type negotiation and arbitration" (*id.* 740)[27]; "[m]ost of the changes were *presumably* made through WJPA (or *New Orleans*)[28] negotiations with only the more difficult issues being decided by an arbitrator" (*id.* 741), but the ICC cited no

[25] Attached as Appendix C to this brief are sections 4 and 5 of WJPA and excerpts from the Journal of the WJPA Negotiations in which its authors discuss the meaning of "selection of forces" and "assignment of employees". This and other excerpts from that Journal were supplied to the ICC at the January 4, 1990 argument.

[26] In the numerous merger and control cases which began with the *Norfolk & Western—Virginian* merger case in 1959 and ended in 1972 when the *Penn Central* met with disaster, labor and management executed so-called attrition agreements in which the railroads provided guarantees of lifetime employment in return for the right to move employees and their work throughout the merged or commonly-controlled systems. *Norfolk & Western Railway Company —Merger, etc., Virginian Railway Company*, 307 I.C.C. 401, 439 (1959); *Chicago & N.W. Ry. Co.—Purchase—Minneapolis & St. L. Ry. Co.*, 312 I.C.C. 285, 296 (1960); *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co.—Merger*, 324 I.C.C. 1, 50 (1964); *Atchison, T. & S. Ry. Co.—Merger*, 324 I.C.C. 254, 255, 261 (1965); *Pennsylvania R.R. Co.—Merger—New York Central R.R. Co.*, 328 I.C.C. 304, 313 (1966); *Great Northern Pac.—Merger—Great Northern*, 331 I.C.C. 228, 277-279 (1967); *Seaboard Coast Line R.R. Co.—Merger—Piedmont & N. Ry. Co.*, 334 I.C.C. 378, 384-385 (1969).

[27] The only "WJPA-type negotiation and arbitration" which occurred during this period was the decision in WJPA Docket No. 141 in which the arbitrator rejected Southern's defense of 5(11) [11341(a)] against employees' WJPA claims. That decision was supplied to the ICC at the January 4, 1990 oral argument and is attached hereto in pertinent part as Appendix D.

[28] The predecessor of *New York Dock*.

such arbitrations; while the scope of the terms "selection of forces and assignment of employees" is "not well-defined . . . [i]t *must extend beyond* the mere mechanism for selection or assignment of employees, *and include* the modification of certain important contractual rights" [29] (*id.* 742); "[w]e *assume* they [labor and management] did what was necessary to permit the carrying out of the merger, including . . . those projects that were direct results of the merger" (*id.* 743); "[w]e *believe* that arbitrators have successfully followed this narrow and difficult path in the past . . ." (*id.* 753).[30] (Emphasis added.)

The only reference to any type of evidence or authority on which to base its assumptions as to what "must have happened" between 1940 and 1980 to maintain the labor-management harmony which then existed, is a list of 95 agreements relating to transfers submitted by CSX. (*Id.* 743.) The Commission concedes that the instances cited "cover[] a later period" and are referred to only for "some guidance" (*id.*) but, as Commissioner Lamboley's dissent notes (*id.* 764 n.55.), they afford no assistance on the issue of whether employees or unions had ever been *required* to arbitrate contract modifications or elimination prior to 1981. Only nine arbitrations were listed and none of them indicate whether they were voluntary or compulsory arbitrations.

As noted in the dissent of Commissioner Lamboley (*id.* 763), the Commission in this decision ignored its

---

[29] *But see,* App. C.

[30] Arbitrator Harris had stated in his *ATDA* award decision that "[p]rior to 1981, the question of whether a carrier could, through a consolidation of forces, effect changes in rates of pay, rules, or working conditions had never been raised in a section 4 proceeding." The ICC does not challenge the accuracy of Harris' statement but dismisses it with the comment that it could be read as "indicating that arbitrators did not make such changes before 1981 . . . [or] that such changes were made and not challenged." (*Id.* 743 n.10.) Such changes, of course, had been made, but only by agreement as noted in footnote 26, *supra.*

own initial decision creating the *New York Dock* conditions: [31]

> When adopting § 2, the Commission noted that it "appears acceptable to all parties" and rejected a labor proposed addition relating to [preserving] subcontracting agreements, stating that "the section, as now written, preserves all existing agreements and, therefore, the suggested language is redundant and unnecessary." *Id.* [360 I.C.C.] at 73.

The remand decision did not address the provisions of Section 3 of *New York Dock* [32] which preserve to employees covered by protective agreements the rights and benefits provided by those agreements and provide employees the option to choose between benefits of an applicable protective agreement [33] and those provided by the conditions imposed by the Commission.

The Commission's remand decision, although adhering to the court of appeals' ruling that section 11341(a) provided it no authority to override collective bargaining agreements, nevertheless accomplished the same result through its claim of virtually identical authority under section 11347. Its assertion of authority to approve by implication all future changes which a railroad may deem necessary to "complete," "implement" or "carry-out" an already consummated merger or control; its assumption that the terms "selection of forces and assignment of employees" required by section 11347 to protect the interests of employees in merger and control cases, "must extend beyond the mere mechanism for selection or assignment of employees, and include modification of certain important contractual rights" (*id.* 742); its reading of the plain language of section 2 of *New York Dock* as preserving employee rights only until it becomes "necessary" to modify or eliminate them; its

---

[31] *New York Dock Ry. Co.—Control—Brooklyn Eastern District Terminal Co.,* 360 I.C.C. 60 (1979).

[32] 360 I.C.C. at 84-85; Appendix B.

[33] In this case the "Orange Book".

failure or refusal to confront the plain language requirements of section 3 of *New York Dock*; its conclusion that section 11341(a) removes resort to RLA procedures to protect employees' contract and representation rights; and, the impossible burden it would place upon employees to show that movement of work and employees from one facility to another is not a "necessary" element in the consolidation of those facilities, all effect the same result as would a ruling that section 11341(a) expressly overrides all RLA and collective bargaining agreement rights of employees whenever a railroad wishes to take any action which could be said to be connected to the consummation of its ICC-approved merger or control.

SUMMARY OF ARGUMENT

The ruling of the court of appeals that section 11341(a), 49 U.S.C. § 11341(a), "does not grant the ICC its claimed power to override provisions of a CBA between a carrier and its employees," is correct. As an implied repeal statute, section 11341(a)'s language must be narrowly construed and the plain language of that section does not indicate that its coverage extends past restraining or prohibitory laws to collective bargaining agreements. Additionally, there is no indication in the legislative history of section 11341(a) that it was intended to interfere with a carrier's collective bargaining agreement obligations and, the ICC, during the sixty-three years that passed between the initial enactment of section 11341(a)'s predecessor and the Commission's decision in the 1983 *DRGW* case, consistently disavowed any jurisdiction over labor relations matters by virtue of section 11341(a) or any other provision of the Interstate Commerce Act and, in the only case presented to it with the specific request to override agreements pursuant to section 11341(a), the ICC held that it had no authority to grant the requested relief. Indeed, the Commission repeatedly disclaimed any expertise whatever in labor relations matters. The court below concluded that in the instant cases the Commission departed from this long-standing position with no explanation, or even acknowledgment that it was doing so and, the Commission has since effectively acknowledged the accuracy of that conclusion.

The actions of the railroads during this period confirm the ICC's lack of authority to override contracts for, in order to consolidate operations and facilities following ICC approval of numerous mergers, they provided employees with guarantees of lifetime employment in return for the right to transfer work and employees across seniority district boundaries in contravention of existing collective bargaining agreements. Such agreements would have been unnecessary had section 11341(a) provided that relief.

The pre-1983 conclusions of the ICC are supported by the history of Congress' treatment of labor relations in the railroad industry. Congress, in its enactment of and amendments to the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, has deliberately and repeatedly refused to require compulsory arbitration of "major" disputes that the Commission now requires by its interpretation of the arbitration requirements of the *New York Dock* conditions.

In any event, section 11341(a)'s exemption authority extends only so far as is necessary for a railroad to carry out an approved transaction in accordance with the conditions imposed by the Commission. Section 11347, 49 U.S.C. § 11347, requires the Commission to impose conditions which preserve the collective bargaining agreement rights of employees and prohibits deprivation of any employees' rights under protective agreements such as the "Orange Book". It is illogical to conclude that conditions required by Congress to be attached to a permissive order can be considered as in conflict with the very order to which they must be attached.

The subject contracts rights of the affected employees are property rights and neither the ICA nor the *New York Dock* conditions provides compensation for the elimination of the prohibitions against transfers of work and employees contained in the CBAs and the Orange Book. Interpreting section 11341(a) as authorizing the elimina-

tion of those rights, particularly where the employees have no voice in accepting or rejecting the ICC order effecting that elimination, renders the validity of that section questionable under the due process and just compensation clauses of the Fifth Amendment. An alternative interpretation is available and should be adopted.

ARGUMENT

The Petitioners and Federal Respondents seek reversal of the ruling of the court of appeals that section 11341(a) does not authorize the Commission to override provisions of collective bargaining agreements. They also seek remand of that ruling "for consideration of any remaining questions, including those that are now pending before the Commission and that may be raised in subsequent proceedings for judicial review." (FR 21-22.)[34]

In their motion to dismiss the writs of certiorari, the Union Respondents contended that the meaning and effect of section 11341(a) was no longer material to the disputes pending between them and CSXT and NS over the latters' right to ignore their contractual and RLA obligations to those employees. (Motion to Dismiss, 5.) Union Respondents remain of that view since the Commission held in its remand decision that whatever might be the meaning or effect of section 11341(a) standing alone, its authority to modify or eliminate the collective bargaining agreement rights of employees is provided, controlled and, limited by section 11347 (*id.* 720). However, the question whether the ICC is correct in now asserting that Section 11347—apart from Section 11341(a)—gives its arbitrators the power to override provisions in a CBA, was not considered by the court below and is not a question presented for review by the writs. *See* Rule 14.1(a) of the Rules of this Court.

---

[34] "FR" references are to the brief filed in these consolidated cases by the Federal Respondents on May 25, 1990. References to the separately filed briefs of Petitioners are "CSXT" and "NS", respectively.

I. THE HOLDING OF THE COURT OF APPEALS THAT SECTION 11341(a) DOES NOT EMPOWER THE ICC TO OVERRIDE COLLECTIVE BARGAINING AGREEMENTS IN CONSOLIDATIONS RESULTING FROM A MERGER OR CONTROL IS CORRECT AND SHOULD BE AFFIRMED

A. The Court's Ruling On The Law Is Correct

The Federal Respondents characterize the ruling of the court below as holding that "the exemptions provided by Section 11341(a) do not apply to those laws governing enforcement of contractual obligations." (FR 21.) The court did not so hold but restricted itself to the very narrow ruling that "§ 11341(a) of the Act does not grant the ICC its claimed power to override provisions of a CBA between a carrier and its employees." (Pet. App. 26a.) It remanded the case to the Commission with respect to that agency's "RLA holdings in order that the agency may determine whether further proceedings are necessary." (*Id.*)[35]

As the court noted in its review of the legislative history of section 11341(a) (*id.* 13a-19a), Congress' emphasis has always been centered on the effort to ensure that no state or federal statute, particularly anti-trust statutes, could prevent the effectuation of a Commission order approving a section 11343 transaction. It noted that when an attempt was made to amend the RLA to provide the ICC power to suspend excessively generous wage agreements between railroad carriers and their employees it was rejected. (*Id.* 18a.)

The court reviewed the Commission's pre-1983 decisions and concluded that historically the ICC had held that section 11341(a) did not relieve carriers from collective bargaining agreements which limited transfers of employees, but that in its 1983 *DRGW* decision, it had departed from that view without explanation (*Id.* 21a-23a),

---

[35] The Commission's remand decision also holds that section 11341(a) enables the ICC to "foreclose [employees'] resort to RLA procedures" for redress of loss of contract rights. (6 I.C.C.2d 754.)

a conclusion with which the ICC now concurs. (Remand decision, 6 I.C.C.2d 755.) The court held that in failing to state any reason for its departure from precedent the Commission erred. Union Respondents respectfully submit that this conclusion of the court is correct. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962), quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947):

> "[A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action . . . ."

The court then held that the Commission had erred in relying on section 11341(a) as providing it exemptive authority over collective bargaining agreements (Pet. App. 26a) and, in light of its holding on section 11341(a), the court believed it unnecessary to address "either the Unions' arguments that to do so [override collective bargaining agreement rights] would be unconstitutional or their claim that, in amendments to the Act in 1976, Congress specifically preserved employees' contractual rights." (*Id.*) The court declined to address the ICC's theory that the employee protective conditions required by Section 11347 are exclusive or that section 4 of *New York Dock* "gives the arbitration committee the 'absolute right' to effectuate the transfer of employees, and to override any contrary provisions of a CBA." (*Id.* 25a.) The court stated that the ICC had "not argued the first theory to us at all" (*id.*) and concluded that if it had "not abandoned its § 11347 theory and the § 4 rationales altogether," it should "reconsider them in the first instance in light of the Supreme Court's intervening decision in *P&LE* rejecting the ICC's related position.[36]

[36] *Pittsburgh & Lake Erie R. v. Railway Labor Executives' Association*, 491 U.S. —— (1989).

The court emphasized the fact that these cases did *not* involve the obstruction of an ICC order approving the merger and control of railroads as the carriers' transfers of work and employees took place "well after the consummation of the ICC-approved transactions[s] . . . ." (*Id.* 21a.) The court concluded that this fact alone reconciled this Court's decisions interpreting section 11341(a) with the result the court reached because in each of those cases[37] the "question of exemption arose before the consummation of the approved transaction." (*Id.*)

Union Respondents respectfully submit that the court of appeals decision in these cases is correct. As will be demonstrated below, whatever the Commission's exemptive authority may be in non-labor cases, the Congress did not grant, nor did it intend to grant, to the ICC authority to override the statutory and contract rights of employees before, during, or after consummation of a section 11343 transaction, by virtue of its enactment of the provisions in section 11341(a).

B. The Court Correctly Declined To Defer To The Commission's Interpretation Of Section 11341(a)

The Federal Respondents and Petitioners argue that the Commission's conclusions regarding its authority are reasonable and therefore entitled to deference which the court of appeals did not accord it. (FR 42-43, NS 38-39, CSXT 28-29.) The court of appeals held that this Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) did not require it to defer to the Commission's interpretation of section 11341(a) as authorizing that agency to exempt carriers from collective bargaining agreement obligations because that court's examination of the language and legislative history of section 11341(a) indicated Congress did not

[37] *Schwabacher v. United States*, 334 U.S. 182, 200-01 (1948); *Seaboard Air Line R. v. Daniel*, 333 U.S. 118, 121 (1948); *Texas v. United States*, 292 U.S. 522, 531-532 (1934). In 1952, the ICC held these cases not applicable to private contracts. *Gulf, Mobile & Ohio R.R. Co.—Abandonment*, 282 I.C.C. 311, 335 (1952).

extend exemption authority to collective bargaining agreements. (Pet. App. 11a-19a.)

Union Respondents respectfully submit that the court of appeals was correct in its reading of the statute and congressional intent for the reasons relied upon by that court. Moreover, when section 11341(a) is read in conjunction with the plain language of section 11347, as Union Respondents submit it must be read, the validity of the lower court's judgment is confirmed.

In the instant cases, the Commission has now conceded that its "assertion of this power [over employee statutory and contract rights] is fairly recent" (remand decision, 755) and, as the court correctly noted (Pet. App. 23a), the ICC made no attempt to justify its assertion of that power at this time when it had consistently and historically refused to claim such power in the past (remand decision, 755).

In addition, since 1983, the Commission has been less than a model of consistency on the subject of its section 11341(a) authority over labor-management relations. For fifty years prior to its *DRGW* decision, the ICC disavowed expertise in labor matters. *See, infra*, 32-33. In *DRGW*, it held it could modify employee rights under contracts if the modifications (crew assignments in a trackage rights agreement) were a part of the contract it approved. Two years later it held its orders, and not labor contracts or the RLA, govern labor relations. *Maine Central, supra.* In the instant cases, prior to the court of appeals decision, the ICC's primary claim of authority to override employee rights was grounded in section 11341(a), but immediately after that court's decision, it agreed with the validity of the court's ruling, disavowed ever having relied on section 11341(a) and placed its full reliance on section 11347 as the source of its authority. *Brandywine, supra* 11. Following this Court's grant of the petitions of CSTX and NS, the Commission returned to its earlier position that section 11341(a) provided the exemption authority to modify or eliminate employee contract rights. (FR 22, *et seq.*) Recently,

the Commission extended the reach of its governance of employee contract rights to the interpretation of collective bargaining agreements.[38] But, on October 5, 1990, the Commission issued a decision in a non-labor setting approving an assignment of trackage rights to the Delaware & Hudson Railway, but refused to decide whether the assignability of those rights was prohibited by other contracts between the parties. The Commission refused to rule on that issue stating: "The Commission normally avoids interjecting itself into contract disputes [citation omitted]". *Canadian Pacific Limited, Et Al.—Purchase and Trackage Rights—Delaware & Hudson Railway Company*, 7 I.C.C.2d 95, 119 (1990).

For these reasons, Union Respondents respectfully submit that the ICC decisions in the instant cases are not entitled to the deference which would normally be accorded them.

II. SECTION 11341(a) DOES NOT AUTHORIZE THE COMMISSION TO OVERRIDE COLLECTIVE BARGAINING AGREEMENTS

Petitioners and Federal Respondents argue that the court of appeals erred in failing to conclude that a party, after entering into a merger or control approved by the Commission, is exempt from any legal obligations imposed by a collective bargaining agreement as well as from the assertion of rights derived from the Railway Labor Act which might impede the carrying out of any future action in implementation of that merger or control. (FR 22, *et seq.*; CSXT 21, *et seq.*; NS 16, *et seq.*) Union Respondents respectfully submit that the Petitioners' and Federal Respondents' view of section 11341(a) is without merit for

---

[38] *Ogeechee Railway Co.—Purchase and Trackage Rights—Missouri Pacific Railroad Company, Etc.*, Finance Docket Nos. 31570 and 31571 (July 27, 1990); *Rio Grande Industries, Inc., Et. Al.—Purchase and Related Trackage Rights—Soo Line Railroad Company, Etc.*, 6 I.C.C.2d 854, 894 (July 16, 1990). *See also, Wilmington Terminal Railroad, Inc.—Purchase and Lease—CSX Transportation, Inc. Lines Between Savanna and Rhine, Etc.*, 6 I.C.C.2d 799, 817 (June 20, 1990).

their reading of that provision impermissibly expands the range of carrier actions within its scope and injects the ICC directly into the labor relations of the railroad industry.

A. The Plain Language Of Section 11341(a) And Its History Do Not Support Its Use As A Basis For ICC Labor Relations Authority

It is axiomatic that the "starting point" in any case involving the interpretation of a federal statute is the "language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Where that language is clear, the inquiry into its meaning should cease, for Congress is presumed to have intended what the plain language of its statutes states. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980). Moreover, since section 11341(a) is in effect an implied repeal statute, it must not be expanded beyond its literal terms—*i.e.*, it must be construed narrowly. *E.g., Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 421 (1986); *accord, Watt v. Alaska*, 451 U.S. 259, 267 (1981). When those principles are applied to section 11341(a), it becomes clear that this immunity provision is not as expansive as Federal Respondents and Petitioners now believe. Moreover, Union Respondents respectfully submit, the Interstate Commerce Act itself, prior decisions by this Court, past ICC practice, the provision's legislative history and, the recent remand decision of the ICC, all demonstrate that section 11341(a)'s exemption authority does not extend to collective bargaining agreements.[39]

While section 11341(a) provides that the ICC's "authority . . . under this subchapter [*i.e.*, Subchapter III of Chapter 113] is exclusive", it is apparent that this exclusive authority extends only to matters over which

[39] Indeed, NS, in its question presented and its argument (NS 16-23), contends section 11341(a) relieves railroads of *all* contracts that impede its carrying out an approved merger.

Congress has given the ICC jurisdiction under the ICA's consolidation procedures.

Section 11343(a) of the ICA, 49 U.S.C. § 11343(a), lists certain railroad transactions that may be undertaken only with the approval and authorization of the Commission. Among those transactions is the consolidation or merger of two or more carriers "into one corporation for the ownership, management and operation of the previously separately owned properties" (section 11343(a)(1)); the "acquisition of control of at least 2 carriers by a person that is not a carrier" (section 11343(a)(4)); and, the "acquisition of control of a carrier by a person that is not a carrier but controls any number of carriers" (section 11343(a)(5)). Section 11341(a)[40] confers exclusive authority upon the Commission only in matters arising under subchapter III of Chapter 113 and exempts carriers participating in an approved transaction "from the operation . . . of all other . . . law, ... as may be necessary to enable them to carry into effect the transaction so approved or provided for an accordance with the terms and conditions, if any, imposed by the Commission."[41] When the successful railroad applicants become

[40] Section 11341(a) was first enacted as Section 5(8) of the Interstate Commerce Act by Section 407 of the Transportation Act of 1920, 41 Stat. 456, 482. Section 11341(a)'s current wording is the result of the codification of the Interstate Commerce Act which was effected by the Recodification Act of 1978. Pub. L. No. 95-473, 92 Stat. 1337 (1978), which effected no substantive change. *See infra*, n.41.

[41] The language quoted is from section 11341(a) as it appeared in section 5(12) of the Act before recodification. Section 3(a) of the 1978 Recodification Act provides that the restatement of the ICA was made without substantive change and "may not be construed as making a substantive change in the laws replaced." 92 Stat. 1466. According to the recodifiers, the phrase "carry into effect" was changed to "carry out" for clarity and the clause "in accordance with the terms and conditions, if any, imposed by the Commission" was omitted "as unnecessary" because of the restatement. House Report No. 95-1395, 95th Cong., 2d Sess. at 159 (1978); Pub. L. No. 95-473, 92 Stat. 1337, 1434. The authors of the recodification viewed as obvious the statutory requirement that any

one corporation or become the subsidiaries of a parent corporation, they have fully effected the authority which the plain language of subchapter III authorizes the ICC to confer. Section 11347 requires the ICC to protect employees from the results of approved "transactions" when they occur, but there is nothing in the law or its history which would permit the ICC to extend its limited and specified approval authority to *results* of transactions, particularly where such an extension would inject it into labor relations.

In the sixty-three years that passed between the initial enactment of section 11341(a) and the Commission's decision in the *DRGW* case, neither the Commission nor the courts believed that the ICC had any jurisdiction over labor relations matters, much less could override the statutory or agreement rights of employees on the basis of authority conferred by that provision.[42]

One of the first to express an authoritative opinion on ICC jurisdiction over labor relations was Joseph B. Eastman, Federal Coordinator of Transportation and Chairman of the ICC. In 1934, Congress was considering amendments to the Railway Labor Act. Section 2 of a pending bill related to the railroads' collective bargaining duties and contained a provision requiring any U.S. Attorney to prosecute violations of its provisions upon the application of the employees' union representative. Representative Holmes suggested deleting the union as an applicant to seek prosecution and to give that responsibility to the ICC. Mr. Eastman responded:

---

permissive Commission order had to be carried into effect in accordance with its conditions. Section 11341(a) in its precodified form as section 5(12) is set forth in Appendix E to this brief.

[42] Federal Respondents and Petitioners rely upon only two decisions from that long history. *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir. 1963), *aff'g* 202 F.Supp. 277 (S.D. Iowa 1962), *cert. denied*, 375 U.S. 819 (1963) and *Norfolk & Western Ry. and New York & St. Louis R.R.—Merger, Etc.*, 347 I.C.C. 506, 511-512 (1974). These cases involved the application of agreements, not their modification or elimination. They are discussed *infra*, 41-42.

> It certainly should not be the Interstate Commerce Commission, because they have no jurisdiction over labor matters at all and never have had.

Hearings on H.R. 7650 Before the House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess. at 54 (1934).

Between 1959 and 1970, many railroad merger and control cases were approved by the Commission in which the unions and managements involved agreed to guarantees of lifetime employment in return for a management right to transfer work and employees throughout the merged system. *See supra*, 13 n.26. Surely, had the railroads thought that section 11341(a) exempted them from the transfer restrictions in their existing agreements they would not have guaranteed their employees lifetime employment to obtain that relief.

After the collapse of the Penn Central and other Northeast railroads, Congress enacted the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 986 ("3R Act"), to preserve that rail service. Penn Central had agreed to life-time protection for their employees as had other merging railroads and for the same reasons. During the course of the hearings on the 3R Act, representatives of labor and the managements of other railroads who had formed a committee to negotiate and submit to Congress for its consideration a statutory provision to replace the Penn Central attrition agreement, testified before the Senate Committee on Commerce. The labor witness testified that in reaching agreement with the railroads on this proposed statutory provision, which became section 503 of the 3R Act,[43] labor wished to provide the corporation to be created [now Conrail] "the widest possible latitude . . . in getting . . . underway" by placing in the statute "unprecedented provisions for transfer of employees and work as between all these various preexisting [railroad] corporations".

---

[43] Section 503 of the 3R Act (45 U.S.C. § 773 (repealed)) is set forth as Appendix F to this brief.

Hearings before the Surface Transportation Subcommittee of the Committee on Commerce, U.S. Senate, on S.2188 and H.R. 9142, 93rd Cong., 1st Sess. at 952-53 (1973). Mr. Graham Claytor, then president of Southern and a management witness, when questioned as to the reason for such expensive protection being accorded employees by the proposed statutory provision,[44] testified that in return for that protection, the railroads involved had been given "the right to trasfer [sic] people within their craft outside of their seniority district"; that "this is terribly important as a practical matter . . . . [w]ork can be transferred freely . . . you may close a shop here and concentrate all the work in another shop there." Mr. Claytor further stated that the freedoms to transfer work and employees "were the principal items that we [the railroads] . . . felt, principal reasons that we felt this agreement made . . . this new corporation [Conrail] a viable thing . . . ." (*Id.* at 972-73.)

Union Respondents respectfully submit that had Mr. Claytor and the other railroads' representatives thought that the Congress had already provided such relief to railroads going before the ICC to obtain merger approval, they would have sought the same relief from Congress for Conrail instead of guaranteeing lifetime protection for Conrail's future employees.

The only attempt at direct use of section 11341(a) to override the statutory and contract rights of employees was made in 1958 by the Chicago and North Western Railway Company ("C&NW") in circumstances remarkably similar to those now before the Court.

The C&NW had leased all lines of the St. Paul, Minneapolis and Omaha Railway Company ("Omaha") as the result of an ICC order. C&NW returned to the ICC complaining that it had tried and failed to obtain agreements with certain of the unions involved which were required before it could carry out the integration of the

[44] The provision became section 505 of the 3R Act, 87 Stat. 1014.

C&NW and Omaha properties under the lease. C&NW asked the ICC to declare (295 I.C.C. 696-697):

> that, in consequence of the exclusive and plenary authority vested in this Commission with respect to the unification of railway carriers, section 6, and related provisions, of the Railway Labor Act are inapplicable and that, in order to enable the parties to carry out the transaction authorized and contemplated by our [I.C.C.] order of December 28, 1956 the parties to this proceeding are expressly relieved of the restraints, limitations and prohibitions of all other laws, including expressly section 6 of the Railway Labor Act; . . .

The Commission held it had no authority to grant C&NW's request because its order approving the lease was permissive as to the carriers and no requirement was made of the employees (*id.* 701); section 5(2)(f) [now § 11347] required certain duties be imposed upon the carriers and did not authorize the ICC to direct the employees or the unions to do anything (*id.*); and, section 5(11) [now section 11341(a)] was self-executing and did not authorize the ICC to declare particular laws superceded by its orders (*id.* 702).[45] Most significantly for the purposes of the history of the application of section 11341(a) are the final two grounds upon which the ICC rejected C&NW's request (*id.*):

> Congress has not conferred upon us the power to determine the disputes which are subject to the Railway Labor Act or questions regarding the jurisdiction of the National Mediation Board, which, in effect, is what North Western requests us to do.
>
> It is apparent that the Railway Labor Act has not prevented the North Western from effectuating the transaction authorized by the prior order. That order authorized the lease of North Western of the line of railroad and other properties owned, used, or operated by the Omaha, and this has been accom-

[45] The court of appeals disagreed with the latter part of this particular holding in the Commission's *Omaha* decision. (Pet. App. 21a.)

plished. The order did not provide any particular method for integration of the physical operations involved, and, except for the imposition of the above-mentioned conditions for the protection of employees, did not deal with employer-employee relationships.

The next case in which the Commission stated its views on ICC authority over labor relations was *Southern Ry. Co.—Control—Central of Ga. Ry. Co.*, 331 I.C.C. 151 (1967). The Commission had approved the control of the Central of Georgia Railway ("Central") by Southern through a stock purchase in 1962.[46] In imposing the conditions for the protection of employees, the ICC had unintentionally omitted protections requiring a 90-day notice of intended changes affecting employees and the negotiation of implementing agreements.[47] The Southern proceeded to abolish over 1500 jobs of Central employees and transferred their work to Southern (331 I.C.C. 171). The Central employees received no recognition of their contract or RLA rights. In 1964, this Court vacated the judgment entered against the unions by a 3-judge district court and remanded the case to that court with instructions that it be remanded to the ICC and that agency ordered to amend its reports and orders "as necessary to deal with [union] appellants' requests that §§ 4, 5 and 9 be included as protective conditions . . . ." [48]

After extended hearings on remand in which it received testimony from the affected employees, the Commission noted that the railroads made no "attempt to negotiate with the railroad organizations of the two railroads for an agreement authorizing the transfer of work from one railroad to the other in effectuating the consolidations" (331 I.C.C. 171) and concluded that the railroads demonstrated "a callous disregard . . . for the established rights and interests of the employees on the Central of Georgia. . . ." (*Id.* 185.)

[46] *Southern Ry. Co.—Control—Central of Ga. Ry. Co.*, 317 I.C.C. 557 (1962).

[47] Protections similar to those in *New York Dock* conditions, Art. I, Sec. 4.

[48] *Railway Labor Executives' Ass'n v. United States*, 379 U.S. 199 (1964).

In the course of its opinion, the ICC set forth its duty and limitations under the law. These statements require no elaboration (*id.* 169-170) (emphasis in original):

> [W]e impose formulae of protective conditions *upon the carriers* seeking specific permissive authority under section 5(2) [now sections 11343, 11344] of the act, the purpose being *to protect* the interests of employees, some of which in a particular case may well have been established under bargaining agreements executed pursuant to the Railway Labor Act.
>
> * * * *
>
> The rights of railroad employees under their collective bargaining agreements, under the Washington Agreement, and under the protective conditions imposed upon the carriers under section 5(2)(f) are independent, separate, and distinct rights. We have historically recognized the independent nature of those rights and have distinguished the employee rights derived from collective bargaining agreements from those derived from conditions which we have imposed upon carriers. The rights under the former are based upon private contracts; those under the latter stem from our statutory duty to protect employees.
>
> * * * *
>
> These protective conditions imposed upon carriers under section 5(2)(f) [now 11347] which provide affected employees compensatory protections for wages, fringe benefits and other losses are designed to apply after the carriers have arrived at their adjustments of the labor forces *in accordance* with the governing provisions of their collective bargaining agreements so that the carriers may be enabled to carry an approved transaction into effect. *Texas & N.O.R. Co. v. Brotherhood of Railroad Trainmen*, (5th Cir., 1962) 307 F.2d 151.

Of equal importance, this contention of applicants is demonstrably erroneous. By its terms, section 5(11) applies only to antitrust and other restraints

> of law from carrying "into effect the transaction so approved . . .". Neither the Washington Agreement nor the specific collective bargaining agreements between these roads and their employees is such a restraint, for indeed *section 5 transactions have been successfully consummated in full compliance with such terms. Cf., Chicago, St. P., M. & O., Ry. Co., Lease,* 295 I.C.C. 696. . . . [Emphasis supplied.]

The Southern and Central did not appeal from this decision.

Union Respondents respectfully submit that prior to the Commission's decisions in *DRGW*, *Maine Central* and their progeny, there is no support to be found for the notion that anyone believed that section 11341(a) could be interpreted to override the contract rights of employees.

B. The Commission Has No Expertise In Labor Relations

The Commission has repeatedly disavowed any expertise in labor relations. Coordinator Eastman was emphatic in rejecting ICC entry into that arena. *See supra*, 27. The language of sections 11343 and 11341(a) contain no implication that they are intended to involve the ICC in labor relations.

In 1977, the Commission expounded at some length on its lack of expertise in labor relations. *Leavens, et al. v. Burlington Northern, Inc.*, 348 I.C.C. 962, 975, 976 (1977). Even as recently as January 26, 1983,[49] in a case in which a union wanted the ICC to declare a railroad in violation of the Commission-imposed employee protective conditions, the Commission refused, reaffirming its lack of "expertise to place ourselves into the field of collective bargaining for labor management relations." *Brotherhood of Locomotive Engineers v. Chicago and North Western Transportation Company, et al.*, 366 I.C.C. 875, 861 (1983). Also in 1977, the Commission rejected a request from another union to remove a pro-

[49] The *DRGW* case was decided ten months later (October 19, 1983).

vision in a trackage rights agreement the ICC had approved which specified the crews which would operate the trains over the leased tracks. The Commission held "that as to . . . matters relating to labor relations as may fall within the purview of the Railway Labor Act the [ICC Review Board correctly] declined jurisdiction over such questions." *Illinois Central Gulf R. Co.—Trackage Rights—Chicago and Ill. Midland Ry.*, Finance Docket No. 28046 (February 22, 1977) (not printed).

While an administrative agency may change its mind regarding the interpretation of the statute it administers so long as it specifies its reasons for doing so, it does not, we respectfully submit, by so changing its mind suddenly acquire an expertise which it had always recognized it did not have.

C. Congress Has Avoided Allowing The ICC Involvement In Labor Matters

Except for its commands requiring the ICC to consider employee interests as part of the public interest and to provide employees with specific minimum protections, the Congress has not given the ICC the right to involve itself in employment matters, least of all labor relations.

Certainly, section 11341(a) cannot be read as a labor relations statute; nor can section 11347, which is a minimum standards type of legislation. *Compare, Fort Halifax Packing Co.*, 482 U.S. 1, 20-22 (1987) *with Terminal R.R. Assoc. v. Brotherhood of R.R. Trainmen*, 318 U.S. 1, 6 (1943). It would be incongruous to conclude that having enacted the Railway Labor Act to govern labor relations procedures in the railroad industry and having often refused to require compulsory arbitration of major disputes in that industry,[50] Congress would require compulsory arbitration of major disputes by implication under the jurisdiction of an agency that has repeatedly held itself out as having no expertise in labor

[50] Section 7 First of the RLA, 45 U.S.C. § 157 First, prohibits compulsory arbitration of major disputes.

relations. It is simply wrong to read section 11347, a minimum standards provision designed to *protect* employee interests, as effecting *sub silentio* such a major change in rail labor relations—*i.e.*, the implied repeal of Section 7 First of the RLA.

Other than the provisions which require protection of the interests of employees who might be affected by ICC orders, the Interstate Commerce Act refers to employees in only two other respects: in section 11344 the "interest of carrier employees affected" is listed as one of the elements of the public interest which the Commission must consider in passing upon one or more of the transactions listed in section 11343(a) and, in section 10101 (a), encouragement of "fair wages and safe and suitable working conditions in the railroad industry" is listed as one of fifteen stated objectives of the United States in regulating the railroad industry.[51] Neither of these provisions gives to the ICC any authority over labor relations.

The Congress, however, has allowed the Commission to affect labor relations in a tangential and most limited way in two provisions contained, not in the Interstate Commerce Act but, in the Railway Labor Act. In section 1 First of the RLA, 45 U.S.C. § 151 First, the ICC, upon request of the National Mediation Board or upon complaint of an interested party, is to determine whether an electric powered railroad is a "carrier" within the meaning of that term as defined in section 1 First; and, in order to determine who would be considered an "employee" or "subordinate official" and thereby subject to the RLA, the Congress authorized the ICC to make that determination based upon the type of work performed by the person involved. However, in providing that authority in section 1 Fifth (45 U.S.C. § 151 Fifth), Congress very carefully circumscribed the ICC's role:

> *Provided, however*, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

[51] *See, United States v. Lowden*, 308 U.S. 225, 332-38 (1939).

Those are the only statutory provisions in the U.S. Code which could be viewed as allowing the Commission to have even the most peripheral effect on railroad labor relations.

The legislative history of the rail consolidation provisions of the Interstate Commerce Act also demonstrates Congress' refusal to extend to the ICC jurisdiction over labor relations matters. Railroads have been subject to federal regulation as an industry for over 100 years (*see*, Act of February 4, 1887, 24 Stat. 379), and during virtually that same period, Congress has also regulated rail labor relations. *E.g.*, Arbitration Act of 1888, 25 Stat. 501. Rail regulation by the ICC became more extensive after the railroads were returned to private ownership by the Transportation Act of 1920, 41 Stat. 456, but Congress has never given the ICC control over labor relations matters, even though such control has been proposed on several occasions. *E.g.*, Testimony of Federal Coordinator Eastman, *supra*; S. Rpt. No. 459, 88th Cong., 1st Sess. at 9 (1963) to accompany S.J. Res. 102, Pub. L. 88-108; 77 Stat. 129.[52]

Although Congress has long recognized that stable labor relations are essential to an efficient national rail transportation system and that there is an overlap between this goal and sound financial regulation by the ICC (*e.g.*, *United States v. Lowden*, 308 U.S. 225, 235-36

[52] In that report, the Senate, and later the Congress, rejected the use of the ICC as the body to investigate and report on a long-time "crew consist" dispute, involving the continued use of firemen on locomotives, by stating (S. Rpt. No. 459 at 9): "[N]either the Interstate Commerce Commission or the other regulatory agencies other than the National Labor Relations Board, which are, in fact, arms of Congress, are designed or intended to serve as a repository for labor disputes. This Committee has no desire to see a change made in this respect."

(1939)), Congress has nevertheless treated the two forms of regulation separately. For example, while Title IV of the Transportation Act of 1920 made extensive amendments to the Interstate Commerce Act, including adding for the first time the predecessor of what is now Section 11341(a), Title III of that Act created the Labor Board to investigate and to report on rail labor disputes; it provided for voluntary adjustment boards to consider minor disputes; and, it required both rail labor and management to exert every reasonable effort to avoid any interruption to the operation of any carrier. 41 Stat. at 469. There is no indication in the Transportation Act of 1920 that Congress also intended to give the ICC any jurisdiction over labor relations matters to the exclusion of the Labor Board or adjustment boards, when it first enacted in Title IV of that Act what is now Section 11341(a). Indeed, by placing the two forms of regulation in separate titles, it must be presumed that the ICC's exclusive authority over consolidations did not include jurisdiction over labor relations matters.

The discrete nature of the two forms of regulation is borne out by the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, ("ERTA"). Congress reenacted in Section 202 of that Act what is now Section 11341(a) as part of its grant of jurisdiction to the ICC over railroad consolidations. *See, Texas v. United States*, 292 U.S. 522, 534-35 (1934). That Act also created the office of the Federal Coordinator of Transportation who was given the specific authority "to encourage and promote or *require* action" on the part of railroads to "avoid unnecessary duplication of services and facilities . . . [and] avoid other wastes and preventable expense . . . ." Section 4 of ERTA, 48 Stat. at 212 (emphasis added). Congress also gave orders of the Coordinator an immunity similar to that it had reenacted for ICC consolidation orders, but, because his orders were mandatory, it specifically limited that immunity in several respects. First, laws "for the protection of the public health or safety" were not to be waived; and, as relevant here: "[N]oth-

ing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act." Section 10(a), ERTA, 48 Stat. at 215; *see also*, Section 10(b), 48 Stat. at 215.

The Federal Respondents and the Petitioners rely heavily upon the 1936 expiration of Title I of the Emergency Transportation Act of 1933 which contained a provision similar to section 11341(a), but with the specific prohibition against the elimination or modification of employees' RLA and contract rights in any order of the Federal Railroad Coordinator compelling specific economies to be undertaken by railroads. (FR, 32-33; NS, 27-29; CSXT, 39-43.) They argue that because Congress permitted Title I to expire and did not amend the section 11341(a)-type provision in Title II to include the specific prohibition against elimination or modification of employees' rights, Congress intended to include the statutory and contract rights of employees within the exemptive authority conferred by section 11341(a). (*Id.*)

Reliance on such an argument is misplaced for it fails to take into account the broader jurisdiction which the Coordinator had, as compared with that given to the ICC. As this Court has stated before:

> From the initial enactment in the Transportation Act of 1920 . . ., to the most recent comprehensive reexamination of these provisions in the Transportation Act of 1940 . . ., Congress has consistently and insistently denied the Interstate Commerce Commission the power to take the initiative in getting one railroad to turn over its properties to another railroad . . . . The role of the Commission in this regard has traditionally been confined to approving or disapproving mergers proposed by the railroads to be merged.

St. Joe Paper Co. v. Atlantic Coast Line R.R., 347 U.S. 298, 305 (1954). Moreover, in passing on the validity of a consolidation transaction proposed by the railroads, the

Commission's jurisdiction is limited to the financial transactions specified in Section 11343(a). The Coordinator's jurisdiction, however, ran to all matters which could permit railroads to operate more economically and he had explicit authority to *require* carriers to take certain actions.

Congress recognized that the Coordinator's broader jurisdiction could cover labor relations matters and it provided certain protections for employees, including advance notice of orders which will affect the interests of employees (Section 7(a)); a prohibition on reductions in numbers of jobs by reason of any action taken pursuant to the authority of the Coordinator (Section 7(b)); a guarantee against individual employees being deprived of employment or placed in a worse position with respect to compensation by reason of any action taken pursuant to authority of the Coordinator (*id.*), and, a specific recognition that the Coordinator's orders did not supersede the Railway Labor Act (Section 10(a)). A comparable limitation on the scope of what is now Section 11341(a)'s immunity as not affecting Railway Labor Act rights was not necessary for the simple reason that Congress in the separate Title devoted to the ICC, had not even arguably given the ICC jurisdiction over labor relations matters.

Moreover, section 11341(a) and its predecessors were never utilized by the Commission to override the statutory and contractual rights of employees until the Commission issued its decisions in *DRGW* and *Maine Central, supra.*[53] And, even assuming that there was some ambiguity in the reach of Section 11341(a) prior to 1976, that ambiguity was eliminated when Congress amended section 11347[54] (then section 5(2)(f)) to direct the Commission

[53] The four attempts to do so prior to the Commission's 1983 *DRGW* decision were rejected. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.—Lease, supra,* 295 I.C.C. 696 (1958); the three arbitration decisions referred to by the ICC in its remand decision at 6 I.C.C.2d 746 were not appealed by the railroad involved (N&W) to the Commission or the courts.

[54] 4R Act, Section 402(a), 90 Stat. 31, 62.

to condition its orders of approval upon terms requiring the carriers to preserve all existing statutory and contract rights of the employees involved should they decide to carry out the permissive authority granted. *See, infra,* 45-47.

Petitioners and Federal Respondents (FR 35-38; NS 29-33; CSXT 43-46) refer to the passage of what was then section 5(2)(f) during Congress' consideration of the Transportation Act of 1940 and argue that Congress' "rejection" of the Harrington Amendment[55] shows that Congress intended to allow carriers to implement consolidations irrespective of the fact that the ICC's approval might result in the unilateral alteration of working conditions "as long as those employees were compensated and otherwise fairly protected under the Commission's labor protective conditions." (FR 38.) Those assertions are without merit for the Transportation Act of 1940 required the ICC to consider as part of its public interest determination the impact of the proposed transaction on employees and to impose a fair and equitable arrangement "*to protect* the interests of the railroad employees affected" by the transaction. Section 7 of the Transportation Act of 1940, 54 Stat. 899, 906-07, adding 49 U.S.C. § 5(2)(b) (emphasis added). It did not authorize or intend the abrogation of employee rights.

The concept of protecting employee interests was not new in 1940, for the Commission had recognized since 1934 that the impact of a transaction on employees was

[55] Representative Harrington proposed that the Commission could not approve a transaction "if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees." 84 Cong. Rec. 9882 (1939). Rep. Harrington's original amendment was not "rejected", but was eventually modified and incorporated as the second sentence of section 5(2)(f) which required that the protective arrangement to be imposed must provide at the minimum that affected employees receive at least a four year guarantee against being placed in a worse position with respect to compensation. *See, Brotherhood of Maintenance of Way Employes v. United States,* 366 U.S. 169, 174 (1961).

an integral part of the public interest to be considered in deciding whether to approve a transaction (*St. Paul Bridge & Terminal Ry.—Control*, 199 I.C.C. 588, 596 (1934)), and for several years prior to 1940, it had been imposing an arrangement to protect employee interests as a condition of its consolidation approvals. *See, United States v. Lowden, supra.* Employee interests were considered and protected, not because employee protection was the price to be paid to allow a rail carrier to change rates of pay, rules or working conditions, but rather, because Congress had determined that it was not in the public's interest for rail employees to be the primary providers of the economic benefits which consolidations could achieve for railroads. *ICC v. Railway Labor Executives' Assoc.*, 315 U.S. 373, 377-79 (1942); *United States v. Lowden, supra*, 308 U.S. at 235-36. Requiring the ICC to consider and to protect the interests of employees is far different from allowing the Commission to authorize new rates of pay, rules, or working conditions, for the former is directed to the parties seeking ICC approval of a consolidation transaction—*i.e.*, the carriers—whereas the latter requires the ICC to direct rail labor to take certain action. As the ICC has said before:

> [U]nder section 5 of the Act [now § 11341, *et seq.*] we merely authorize or permit the applicant carriers to enter into a proposed transaction. We may not even compel the carriers to consummate an authorized transaction. . . .
>
> Under section 5(2)(f) of the Act, we are "required" to impose upon the carriers in each approved transaction conditions for the protection of railroad employees affected. But this section only authorizes the imposition of duties upon the carrier. It does not authorize us to direct the employees or organizations of employees to do anything . . . .

Chicago, St. Paul, Minneapolis & Omaha Ry.-Lease, supra, 295 I.C.C. at 701. Congress, Union Respondents respectfully submit, intended labor relations matters arising from a consolidation to be resolved by the procedures of the Railway Labor Act. *See generally, Air Line Pilots*

Assoc. v. CAB, 667 F.2d 181 (D.C. Cir. 1981); *Delta Air Lines, Inc. v. CAB*, 543 F.2d 247, 260 (D.C. Cir 1976) (Civil Aeronautics Board's jurisdiction over airlines does not extend to safety matters which are subject to jurisdiction of Federal Aviation Administration).

Union Respondents' position that the ICC does not have jurisdiction over labor relations matters is supported by the ICC's treatment of the supposed conflict between the Interstate Commerce Act and the Railway Labor Act prior to 1983. *See, supra*, 27-32. Union Respondents' position as to the limited nature of the ICC's exclusive jurisdiction under Section 11341(a) is supported by the Fifth Circuit's decision in *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen, supra*, in which the railroads sought to enjoin a strike by rail labor over the carriers' refusal to negotiate under the Railway Labor Act changes in working conditions resulting from an ICC approved consolidation transaction. 307 F.2d at 158. As the Fifth Circuit observed, the railroads included in their application to the ICC "such detail . . . as to determine the major provisions of a new labor contract [to govern the new operations], although at no time were the unions brought into the negotiation of these agreements." *Id.*:

> The appellants then argue that ICC approval of the agreements makes them binding on the unions. If so, not only does section 5 give the Commission power to approve a section 5(2) transaction, but it gives the carriers the right to legislate the terms of a continuing contract with a third party, although a different contract more favorable to the third party might have been equally acceptable to the Commission. We do not feel the statute may be so interpreted.

A contrary result was reached at about the same time in *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963) upon which Petitioners and Federal Respondents rely. But the fact that the *BLE* case would create a conflict between the ICA and the RLA schemes of regulation and the *T&NO* case accommodates those schemes without conflict; and, the fact that

in *BLE* there was no conflict for the union was bound by a voluntary agreement to arbitrate, substantially lessen *BLE*'s value to Petitioners and Federal Respondents.

The only pre-1983 statement of the ICC relied upon by Petitioners and Federal Respondents is *Norfolk & W. Ry. Merger*, 347 I.C.C. 506, 511-12 (1974), in which the Erie-Lackawanna Railroad had been included in the N&W merger and had signed an employee protection agreement which its court-appointed Trustee wished to have rescinded. Labor argued, *inter alia*, that the ICC had no authority to rescind the agreement. The ICC said in the course of its opinion that it could do so under section 5(11), but it did not and required the Trustee to abide by the agreement. The decision was not appealed.[56]

In the 102 years that Congress has regulated rail labor relations, it has refused to compel the arbitration of major disputes, except in a few special cases where the bargaining process had been exhausted without agreement. *E.g.*, *supra*, n.52. Indeed, Section 7 First of the Railway Labor Act, 45 U.S.C. § 157 First provides: "That the failure or refusal of either party to submit a controversy [over rates of pay, rules, or working conditions] to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act *or otherwise*." (Emphasis added.) Also, Congress has concluded that in order to encourage compromise, neither rail management nor labor can change the status quo during the negotiation and mediation phases of the compulsory bargaining. 45 U.S.C. §§ 152, Seventh, 155 First and 156. This Court has held those status quo requirements to be central to the design of tnis labor statute. *Detroit & Toledo Shore Line R. v. UTU*, 396 U.S. 142, 150 (1969). As this Court has explained:

> The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned, these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce . . . .

Terminal Railroad Assoc. v. Brotherhood of Railroad Trainmen, supra at 6 (1943) (footnote omitted).

Whether judged by Section 11341(a) or by general conflict of laws principles, it is clear that the ICC has no authority in labor matters and that separate schemes in regulating railroad transportation under the Interstate Commerce Act and the Railway Labor Act do not conflict, for the goals of both Acts are compatible.[57] As this Court has stated before, repeals by implications "are not favored" (*e.g.*, *Morton v. Mancari*, 417 U.S. 535, 549 (1974)) and will not be found to exist unless the intention of the legislature to repeal is clear and manifest. *Watt v. Alaska*, *supra*, 451 U.S. at 267. Indeed, federal courts "must read the statutes to give effect to each if we can do so while preserving their sense and purpose." *Id.* Here, Federal Respondents and Petitioners have made no attempt to read the Interstate Commerce Act's consolidation provisions together with the commands of the Railway Labor Act, but the fact that

[56] Neither *BLE* nor *N&W Merger* overrode contracts and prior to 1983, neither case had been relied upon by the ICC to support an order overriding a contract.

[57] Congress' refusal to vest the ICC with labor relations authority renders *Schwabacher v. United States*, *supra* inapposite here because *Schwabacher* held state law was pre-empted where Congress had given the ICC "complete" control of the subject matter. There, the ICC had "complete control of the capital structures to result from a merger," 334 U.S. at 191-92, 195, by virtue of 49 U.S.C. §§ 11301 and 11343. Neither those nor any ICA provision give ICC control over labor matters.

the two Acts have existed side-by-side without a conflict for more than fifty years prior to the Commission's 1983 shift in its policy toward employee rights, as acknowledged by ICC (*supra*, 12) demonstrates that the two Acts can be read so as to give effect to each.

Imposed arbitrated changes, such as those which occurred in the arbitration awards in these cases, are contrary to the Railway Labor Act. More important, they have brought with them, as recognized by the ICC, *supra*, 12, a deterioration of labor-management relations; a "loss of employee morale when the demands of justice are ignored." *United States v. Lowden*, *supra*, 308 U.S. at 236. These results are contrary to the goals of the Interstate Commerce Act. *See*, *ICC v. Railway Labor Executives' Assoc.*, *supra*, 315 U.S. at 377. As this Court has explained:

> The Commission acts in a most delicate area here [*i.e.*, a strike situation where it was asked to certify a replacement motor carrier], because whatever it does affirmatively . . . may have important consequences upon the collective bargaining processes between the union and the employer. The policies of the Interstate Commerce Act and the labor act necessarily must be accommodated, one to the other

Burlington Truck Lines, Inc. v. United States, *supra*, 371 U.S. at 172-73. Unfortunately, by concentrating solely on the speedy implementation of all aspects of an approved transaction, no matter when they occur after the transaction itself has been consummated, and by ignoring the limits of its jurisdiction, the ICC has made no attempt to accommodate the policies of the two statutes. It has simply ruled that employee contract and statutory rights must give way to its orders because "its order and not the RLA or . . . [employee contracts] govern employee-management relations in connection with the approved transaction." *Maine Central*, *supra*.

D. Section 11347, Particularly As Amended In 1976, Prohibits The ICC From Modifying Or Eliminating Employees' Contract And Statutory Rights

As demonstrated above, prior to 1983 the Commission, the railroads, the unions and the Congress considered the ICC to have no authority over the modification or elimination of the contract or statutory rights of employees. However, if such an issue had existed it would have been laid to rest by the 1976 amendments to the Act.

As this Court has recognized, the 4R Act and the Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895, "aimed at reversing the rail industry's decline through deregulatory efforts, above all by streamlining procedures to effectuate economically efficient transactions." *Pittsburgh & Lake Erie Railroad Co. v. Railway Labor Executives' Association*, 491 U.S. ——, (1989), slip op. at 8. Yet, as the Congress progressively loosened the bonds of regulation on the railroads in each of these statutes, it added and *increased* protections to be afforded the railroad employees that might be affected thereby.

In its first step toward deregulation, the 4R Act, Congress increased the compensatory protections as well as the length of the protective period (from 4 to 6 years) for employees affected in consolidation cases and explicitly required the Commission to impose the same protections for railroad employees affected by consolidations as it had required the Secretary of Labor to establish for the protection of railroad and other employees affected by the Rail Passenger Service Act of 1970, 45 U.S.C. § 501, *et seq.*, in section 405(b) of that act, 45 U.S.C. § 565(b).[58] The 1976 amendment to section 11347 did not stir opposition from the railroads or the unions precisely because they recognized its plain language as a confirmation of existing law that the ICC had no juris-

[58] 4R Act, section 402(a), 90 Stat. 62. In relieving the railroads of many of the burdens associated with the abandonment of railroad lines, Congress also increased employee protection to the level of that provided them in section 402 and made that protection mandatory. 4R Act § 802, 90 Stat. 127-28 [now 49 U.S.C. 10903].

diction over the contractual and statutory rights of employees. There is virtually no legislative history of section 402(a) of the 4R Act which amended section 11347. Perhaps Congress wished to be certain no one could interpret the beginning of its deregulation of railroad obligations as lessening or affecting in any way the railroads' obligations to their employees; or, perhaps, because by that amendment Congress for the first time was expressly requiring the imposition of the notice, negotiation and arbitration provisions of WJPA, it wanted to be certain that no one could interpret that requirement as providing the ICC with authority to affect the contract or statutory rights of employees. Whatever Congress' reasons, its plain language is unmistakable in directing the Commission to ensure preservation of those rights.[59]

In effecting its completion of railroad deregulation by enacting the Staggers Rail Act, Congress did not affect the increased protections it had afforded the employees in the 4R Act, but, in those provisions in which it relieved railroads of specific ICC regulation, it inserted specific mandatory or discretionary protection for employees who might be affected by those provisions.[60]

---

[59] Neither the Federal Respondents, the ICC individually nor the Petitioners confront the equally explicit language of section 3 of the *New York Dock* conditions which prohibits deprivation of employee rights under protective agreements such as the "Orange Book". *See* Appendix D.

[60] Section 213 (49 U.S.C. § 10505) (relief from all ICA requirements and ICC regulations except (1) employee protection and (2) prohibited intermodal ownership); Section 219 (49 U.S.C. § 10706) (lessened need for rate bureaus but require section 11347 employee protection); Section 221 (49 U.S.C. § 10901) (construction of rail lines, discretionary protection equal to section 11347); Section 223 (49 U.S.C. § 11103) (reciprocal switching agreement discretionary employee protection); Section 226 (49 U.S.C. § 11123) (limitations on issuance of car service orders, required hiring of employees who had performed that work); Section 227 (11 U.S.C. § 1170) (bankruptcy courts bound by section 11347); Section 228 (liberalized merger provisions but left section 11347 untouched); Section 401 (49 U.S.C. § 10910 (sales of lines to "financially responsible" persons for "feeder line" development, required use of

Union Respondents respectfully submit that the extreme and deliberate care demonstrated by the Congress to ensure the protection of employee interests in these statutes demonstrates an emphatic rejection by Congress of any notion that section 11341(a) could be considered as allowing the elimination of any statutory or contract rights of railroad employees; indeed, section 11341(a) exempts carriers from laws that would prevent a transaction from being carried out *as conditioned* (*see supra*, 25) and, section 11347, expressly requires any transaction subject to section 11341(a)'s provisions to be conditioned upon the preservation of employees' statutory rights.

Union Respondents respectfully submit, it is illogical to conclude that conditions required by Congress to be imposed by an ICC order could be considered as in conflict with the very order to which they are required to be attached.

III. AN INTERPRETATION OF SECTION 11341(a) AS RELIEVING A RAIL CARRIER OF ITS OBLIGATIONS TO EMPLOYEES UNDER ITS COLLECTIVE BARGAINING AGREEMENTS, WOULD BE CONTRARY TO THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Another and more fundamental problem is presented by Petitioners' and Federal Respondents' position regarding the reach of Section 11341(a). If their view of Section 11341(a) is adopted, that statute would deprive third parties (who happen to be parties to a contract with an applicant railroad) of contractual rights without due process of law, and without just compensation, in contravention of the Due Process and Just Compensation clauses of the Fifth Amendment. U.S. CONST. amend. V. Since it is possible, as the court of appeals concluded, to read Section 11341(a) in such a manner as to avoid these

---

employees who "normally" would have performed the work); Section 402 (49 U.S.C. §§ 10903, 10904) (liberalized abandonment provisions but required section 11347 protection).

Fifth Amendment problems, this Court should not accept Petitioners' and Federal Respondents' constitutionally infirm construction of that statute. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974).

These consolidated cases, Union Respondents respectfully submit, are excellent examples of the Fifth Amendment pitfalls into which the railroads would take the ICC by their construction of Section 11341(a). Here, both the ATDA and BRC are parties to contracts with their respective railroads which provide that the work which the railroads transferred shall be performed by employees employed by those railroads and subject to those agreements. Additionally, the BRC's agreement with CSXT, the Orange Book, goes further and provides that CSXT has agreed not to transfer protected BRC employees or their work beyond the former SAL-ACL systems, and it made those commitments in exchange for the right, which it has since exercised, to transfer work and employees within the combined former SAL and ACL systems.

Both agreements confer property rights which are protected by the Fifth Amendment. *E.g., Brock v. Roadway Express, Inc.*, 481 U.S. 252, 260 (1987); *Lynch v. United States*, 292 U.S. 571, 579 (1934). While Congress may exercise its Commerce Clause powers in such a manner that contracts, which were valid when made, are no longer enforceable (*e.g., Louisville & Nashville R. v. Mottley*, 219 U.S. 467, 480 (1911)), it is also clear that Congress' Commerce Clause powers are limited by the protections afforded by the Fifth Amendment's Due Process and Just Compensation protections. *E.g., Wilson v. New*, 243 U.S. 332 (1917). In other words, Congress may make a contract unenforceable, but that action is far different from *relieving* one party of its contractual obligation to the other contracting party, as Petitioners and Federal Respondents argue has occurred here.

The Fifth Amendment's Due Process guarantees, rail labor submits, prohibits Section 11341(a) from being

used to relieve a railroad of its contractual obligations to a third party, such as its employees, which does not have an equal voice in deciding whether to accept or to reject the ICC's permissive regulatory approval.[61] Indeed, the fundamental unfairness in such a use of the ICA's regulatory scheme is self-evident here, where the carriers are attempting to use ICC approvals to override contracts years after those agreements were executed and the consideration has been accepted and utilized by the railroads.

Also, the Fifth Amendment's provision that "private property [shall not] be taken for public use without just compensation" prohibits Section 11341(a) from being interpreted so as to deprive the protected BRC employees of their Orange Book guarantees. Those guarantees were purchased by contract concessions long-ago accepted by CSXT's predecessors, and now CSXT is attempting to use Section 11341(a) to be relieved of its obligations to pay the protected employees their part of the bargain. Under such an interpretation, the ICC's order would have the effect of confiscating the protected employees' property rights. *See, United States v. Larionoff*, 431 U.S. 864, 879 (1977). Such a taking, we submit, would be without just compensation, for no "reasonable, certain and adequate provision for obtaining compensation" is provided. *Cherokee Nation v. Southern Kansas R.*, 135 U.S. 641, 659 (1890). The *New York Dock* conditions, may protect an employee's compensation but, because they are premised on the assumption that contract rights will be preserved, do not compensate employees for lost *contract* rights. Moreover, the *New York Dock* conditions contain no protections from loss of Orange Book prohibitions against transfer of work and employees.

---

[61] *See, Regents of The University System of Georgia v. Carroll*, 338 U.S. 586, 600 (1950) "The [FCC] . . . may impose on an applicant [for a license renewal] conditions which it must meet before it will be granted a license, but the imposition of the conditions cannot directly affect the applicant's responsibilities to a third party dealing with the applicant."

Petitioners' and Federal Respondents' construction of Section 11341(a), would have far reaching, and, we submit, unconstitutional implications, because, as NS acknowledges (NS 21-22 n.24), no contract between an applicant railroad or motor carrier and a third party, such as a bank, a supplier, or union, would be free from the possibility of being abrogated if the applicant subsequently were to conclude that it could operate more efficiently without complying with that contract. *See*, R. A. Allen, *Railroad Line Sales*, 57 Transp. Pract. J. 255, 278-79 (1990). The ICA, including Section 11341(a), has never been read before to have such a destructive effect on contractual obligations (*e.g.*, *Central New England Ry. v. Boston & Albany R.*, 279 U.S. 415, 419 (1929) (construing what is now § 10903)), and no reason has been shown, we submit, why it should suddenly have such an effect seventy years after Congress first regulated rail mergers and consolidations.

CONCLUSION

For the reasons set forth herein, Union Respondents respectfully submit that the judgment below should be affirmed.

Respectfully submitted,

WILLIAM G. MAHONEY
(Counsel of Record)
JOHN O'B. CLARKE, JR.
HIGHSAW, MAHONEY & CLARKE, P.C.
1050 17th Street, N.W.
Suite 210
Washington, D.C. 20036
(202) 296-8500
Attorneys for Union Respondents

Date: November 9, 1990

APPENDICES

APPENDIX A

Statutes And Constitutional Provision Relied Upon

I. Fifth Amendment to the Constitution of the United States

II. Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*

- A. Section 11343(a), 49 U.S.C. § 11343(a)
- B. Section 11344(b) and (c), 49 U.S.C. § 11344 (b) and (c)
- C. Section 11347, 49 U.S.C. § 11347

III. Rail Passenger Service Act, 45 U.S.C. § 501, *et seq.*

- A. Section 405(a) and (b), 45 U.S.C. § 565(a) and (b)

I. Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

II. Interstate Commerce Act, 49 U.S.C. § 10101, et seq. (Relevant Excerpts)

A. Section 11343(a), 49 U.S.C. § 11343(a)

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III or chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

(1) consolidation or merger of the property or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

(2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) acquisition of control of a carrier by any number of carriers.

(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

B. Section 11344(b) and (c), 49 U.S.C. § 11344(b) and (c)

(b)(1) In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result form the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(E) whether the proposed transaction would have an adverse affect on competition among rail carriers in the affected region.

(2) In a proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter II of chapter 105 of this title, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

C. Section 11347, 49 U.S.C. § 11347

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565). Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employ-

ees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

III. Rail Passenger Service Act, 45 U.S.C. § 501, et seq. (Relevant Excerpt)

A. Section 405(a) and (b), 45 U.S.C. § 565(a) and (b)

(a) A railroad shall provide fair and equitable arrangements to protect the interests of employees, including employees of terminal companies, affected by a discontinuance of intercity rail passenger service whether occurring before, on, or after January 1, 1975. A "discontinuance of intercity rail passenger service" shall include any discontinuance of service performed by railroad under any facility or service agreement under sections 305 and 402 of this Act pursuant to any modification or termination thereof or an assumption of operations by the Corporation.

(b) Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; (4) assurances of priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting indiivdual employees against a worsening of their positions with respect to their employment which shall in no

event provide benefits less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act. Any contract entered into pursuant to the provisions of this title shall specify the terms and conditions of such protective arrangements. No contract under section 401 (a)(1) of this Act between a railroad and the Corporation may be made unless the Secretary of Labor has certified to the Corporation that the labor protective provisions of such contract afford affected employees, including affected terminal employees, fair and equitable protection by the railroad.

APPENDIX B

New York Dock Conditions (Relevant Excerpts)

1(a)—"Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

* * * *

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements: *provided*, that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; *provided further*, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement

4. *Notice and agreement or decision.*—(a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

APPENDIX C

Washington Job Protection Agreement of 1936

(Relevant Excerpts)

* * * *

Section 4. Each carrier contemplating a coordination shall give at least ninety (90) days written notice of such intended coordination by posting a notice on bulletin boards convenient to the interested employes of each such carrier and by sending registered mail notice to the representatives of such interested employes. Such notice shall contain a full and adequate statement of the proposed changes to be effected by such coordination, including an estimate of the number of employes of each class affected by the intended changes. The date and place of a conference between representatives of all the parties interested in such intended changes for the purpose of reaching agreements with respect to the application thereto of the terms and conditions of this agreement, shall be agreed upon within ten (10) days after the receipt of said notice, and conference shall commence within thirty (30) days from the date of such notice.

Section 5. Each plan of coordination which results in the displacement of employes or rearrangement of forces shall provide for the selection of forces from the employes of all the carriers involved on bases accepted as appropriate for application in the particular case; and any assignment of employes made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employes affected, parties hereto. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13.

Excerpts From Washington Job Protection Agreement Journal of Negotiations

* * * *

WASHINGTON, D.C., MAY 13, 1936

Meeting was held with the Labor Executives in Room 1030, Transportation Building, Washington, D.C. at 11:00 A.M.

PRESENT:

Messrs.

A. A. Enochs
H. A. Benton
G. E. Bruch
C. A. Clements
E. J. Connors
C. M. Dukes
J. B. Parrish
Jno. G. Walber
William White

E. M. Davis
G. W. Knight
C. C. Handy
J. M. Souby
Ed. Murrin

H. E. Jones
M. L. Long

Labor Executives:

Messrs.

G. M. Harrison—Brotherhood of Railway & Steamship Clerks

W. D. Johnson—Order of Railway Conductors

S. R. Harvey—Brotherhood of Railroad Trainmen

Mr. Burke—Brotherhood of Locomotive Engineers

D. B. Robertson—Brotherhood of Locomotive Firemen & Enginemen

T. C. Cashen—Switchmen's Union of North America

F. H. Fljozdal—Brotherhood of Maintenance of Way Employees

A. E. Lyon—Brotherhood Railroad Signalmen of America

B. M. Jewell—Railway Employees' Department, A. F. of L.

J. G. Luhrsen—American Train Dispatchers' Association

Roy Horn—International Brotherhood of Blacksmiths, etc.

Mr. Obie—Order of Sleeping Car Conductors

Donald R. Richberg—Counsel

Mr. Harrison referred to the last conference at which the Joint Conference Committee went over the draft of agreement etc. Mr. Harrison replied that the agreement did not include these services; it applied only to employees covered by agreements and is co-extensive with the schedule agreements.

Section 3. Mr. Enochs stated the conference committee objects to the last clause dealing with corporate organizations, the effect being to bring under the agreement actions of a single carrier. It was also suggested that this subject should be left to the discretion of the Interstate Commerce Commission. Mr. Robertson voiced the opinion that this paragraph was designed to cover cases where two carriers are listed in the agreement each as single carriers but some time later are consolidated by authority of the Interstate Commerce Commission into

one carrier. In such cases it was the thought of the labor executives that the agreement would protect the employees. There was a disagreement between Mr. Robertson and Mr. Harrison on this point. Mr. Harrison explained that the purpose of the clause was that if a single carrier, party to the agreement later unifies their corporate organizations by authority of the Interstate Commerce Commission which resulted in a change in operations, then the agreement would apply, even though the carrier is listed as a single carrier, party to the agreement. He cited as illustrative the Santa Fe and Santa Fe of Texas; the Rock Island and Rock Island and Gulf; Frisco and Frisco of Texas.

* * * *

Section 4—No disagreement.

Section 5. Mr. Enochs stated this should be rephrased using part of the proposals of the labor executives and of the conference committee. A clause should also be inserted providing for settling a dispute in case of failure to agree. Mr. Harrison stated there was no objection to this and they proposed rewriting their Section 13 to cover this matter. It was suggested that a time limit be fixed within which agreement must be reached so that the dispute can be forwarded for settlement. Mr. Harrison explained that they had thought a 30-day limit from the time a dispute arises. Question was raised whether the agreement referred to in this paragraph must be in accordance with seniority rules and practices in effect on the home roads and Mr. Harrison replied that no change in seniority rules or practices on the roads can be brought about by this agreement; that the management and the committees on the roads are the only parties who can modify the schedules. He stated that the assignments must be made in accordance with the rules and practices existing on the home roads but the allotments of employees would be in accordance with the agreement reached.

* * * *

It was suggested that the words "accepted as appropriate" be used instead of "recognized as appropriate" in the first sentence of conference committee proposed Section 5.

At 12:45 P.M. recess was taken util 2:15 P.M.

APPENDIX D

Washington Job Protection Agreement of 1936

Docket No. 141

(Relevant Excerpts)

Decision by Referee Bernstein

Parties to the Dispute

American Railway Supervisors Association
American Train Dispatchers' Association
Brotherhood of Locomotive Engineers
Brotherhood of Locomotive Firemen & Enginemen
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees
Brotherhood Railway Carmen of America
Brotherhood of Sleeping Car Porters
International Association of Machinists
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Firemen and Oilers
Railroad Yardmasters of America
Sheet Metal Workers' International Association
Switchmen's Union of North America
Transportation Communication Employees Union

and

Southern Railway System and
Central of Georgia Railway Company

* * * *

The major questions presented are:

(1) Were the job changes complained of the result of "coordinations" within the meaning of Section 2 of the Washington Agreement?

(2) Do Sections 5(2)(f) and 5(11) of the Interstate Commerce Act, and the employee protective conditions

issued pursuant to the former, extinguish the applicability of the Washington Agreement, to which both Carriers are signatories, so that (3) the Carriers were relieved of their obligations to give notice to the Organizations of the intended alleged coordination and to negotiate implementing agreements before the coordinations could be put into effect?

* * * *

(b) *The applicability of the Washington Agreement*—

Acting under Section 5(2) of the Interstate Commerce Act,[1] the ICC approved the Southern's acquisition of control of Central on condition that certain employee protective conditions, in substance the New Orleans Conditions, be afforded affected employees. These conditions apply the "Oklahoma Conditions" which although patterned after the Washington Agreement, differ from it in several major respects—the guarantee to employees deprived of employment is 100% of test period average earnings rather than 60% and the maximum duration of protec-

---

[1] It provides:

As a condition of its approval, under this paragraph (2) of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers, prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

tion is four years rather than five—and a few minor ones; moreover, where the Washington Agreement would yield more "compensation," an employee is entitled to receive it. This pattern derives from the *New Orleans Union Passenger Terminal Case*, 282 ICC 271. In its first decision in that case (267 ICC 763) the Commission imposed protective conditions which would have expired four years from the effective date of its order, interpreting Section 5(2)(f) as imposing such duration as a maximum. However, the construction of the terminal was to take most of that period, thereby rendering the "protection" practically meaningless. The Supreme Court held that the four year period specified in Section (5) (2) (f) was not a maximum but a minimum and remanded the case to the Commission. In turn the Commission added the Washington Agreement compensation terms to those of the Oklahoma Conditions so as to extend the protection for a longer period. So, when the Commission has imposed the New Orleans Conditions up to the time of this case it has included the Washington Agreement specifically, making express mention, however, of only the monetary protections.

At issue is whether the non-monetary procedural aspects of the Washington Agreement must be observed when railroads affect coordinations after their corporate affiliation is authorized by the ICC and the Commission prescribes conditions for the protection of employees. Section 4 of the Washington Agreement requires advance notice of an intended coordination and Section 5 of the Agreement requires an agreement between carrier and union before a coordination may be put into effect. Dockets Numbered 70 and 57.

The Washington Agreement came into being in May 1936; Section 5(2)(f) dates from September 1940. The history and purpose of each must be understood in order to determine their interrelation.

As noted in Docket No. 106, in the railroad industry the recognition and scope provisions of rules agreements

commonly are regarded as defining jurisdiction and job "ownership" which prohibit the transfer of work from employees under one agreement to employees—even in the same craft—under another rules agreement. As a result, combining the work of employees of two carriers or shifting work from the employees of one carrier to those of another, the most common means of effectuating coordinations, could not be accomplished without incurring penalty payments to those employees who lost the work. As the savings to be achieved by reducing employment by the combination and rationalization of work of two or more carriers is a major purpose of railroad mergers and acquisitions, a means to overcome the barrier imposed by the rules agreements was necessary. The Washington Agreement serves that purpose—it permits such combinations and transfers of work under specified conditions —including notices of intended coordination, negotiated implementing arrangements, guarantees for employees whose earnings or employment are adversely affected and other benefits. The Agreement—although concluded under the threat of legislation unwelcome to both railroad management and organized labor—was a voluntary private collective agreement entered into by the major railroads and railroad labor organizations to enable the carriers to achieve mergers and to cushion their impact upon employees. Since 1936 many railroads have acceded to the Agreement so that its scope among carriers now is almost universal, although some few unions representing railroad employees are not signatories.

Section 5(2)(f), enacted in 1940, directs the Interstate Commerce Commission to impose conditions for the protection of employees in merger and other cases. In intent and practice those conditions are much like those of the Washington Agreement. The labor organizations declared at the hearings on the measure that they sought to achieve similar employee protections on railroads which then did not subscribe to the Washington Agreement. Other provisions of the 1940 Act relieved the carriers of the threat of mandatory mergers hanging over their heads from

earlier Transportation Acts. In the period preceding enactment in 1940 there was no recalcitrance by railroad labor organizations which arguably required any limitation upon their rules agreements and the job ownership they often were taken to imply; no one contended that the Washington Agreement was inadequate to its tasks. Nothing in the legislative history of Sections 5(2)(f) or 5(11) was presented which even remotely shows an intention by Congress, or anyone else, to abrogate the rules arrangements, including their merger-barring effect and the Washington Agreement's machinery for overcoming them. Indeed, as noted below, the legislation specifically recognizes the desirability and validity of such private arrangements.

Quite clearly Section 5(11) operates to relieve carriers involved in a merger approved by the ICC of any requirement for State agency approval, the antitrust laws and other Federal, State or municipal law. Although the claim is made that this section reaches so far as to overcome provisions of the Railway Labor Act as applied to the Washington Agreement, the context and pattern of the section suggest otherwise. All of the references are to corporate, antitrust and State and local regulatory laws—there is no hint that labor-management relations are involved. Nothing in the legislative history was brought forward to suggest that a wholesale change in the procedures of the Railway Labor Act for modifying rules agreements—assuredly a fundamental and important change—was intended. Any such endeavor would have meant a major legislative battle on the point; but no such thing occurred. It staggers the imagination that so radical a change was in fact meant and made without anyone noticing at the time.[2] Nor was such an effect necessary as to mergers because the Washington Agreement provided the mechanism to accomplish them. (The

---

[2] Note 2 in Brotherhood of Locomotive Engineers v. Chicago and N.W. Ry. Co., (CAS, 1963) 314 F.2d 424, 432 is not persuasive on this point. Such comparisons may be indicative but are hardly dispositive of Congressional intent.

Harrington Amendment was an unsuccessful attempt to get more than the Agreement gave employees; its rejection by Congress does not mean that where their national agreement applied they were to get less.) As noted many years ago by Referee Gilden in the opinion in Docket No. 27:

> The Transportation Act of 1940, of which Section 5(2)(f) of the Interstate Commerce Act is a part, was enacted with full knowledge and thorough familiarity with the terms of the Washington Agreement. There is no discernible manifestation of any Congressional design to emasculate it entirely or otherwise to thwart or subdue its potency. Actually, its legislative history reveals an affirmative willingness by Congress to permit the protective features embodied in the Washington Agreement to continue unimpaired alongside of those imposed by the statute on the Interstate Commerce Commission. . . .
>
> Implicit in the pronouncement made to Section 5(2)(f) to the effect that, notwithstanding the relief afforded in that provision and certain other sections, the Carriers and the authorized representatives of their employees could, nevertheless, thereafter enter into contractual arrangements for the protection of employee interests adversely affected by Carrier transactions, is the recognition that all existing prior understandings, arrived at by the same principals, dealing with the identical subject, and similarly designed to serve the very same purpose, are also sanctioned.

In that case the Carriers argued that Section 5(2)(f) vitiated the Washington Agreement. The Referee rejected the contention, also noting that Carriers had not given any indication of withdrawing from the Washington Agreement.

In Docket No. 64 I rejected a similar contention by the Organization that an outstanding Commission order imposing the New Orleans conditions (which included the

arbitration provisions of the Oklahoma Conditions), issued pursuant to Section 5(2)(f), precluded application of the Washington Agreement's procedure. I noted that the earlier ruling was made in the face of ICC conditions much like the Oklahoma Conditions. The differences between those arbitration provisions and those in the ICC order in the Southern-Central case provide no reason for a different conclusion here.

Carriers also argued that Docket No. 64 differs from this case because in the former the Commission expressly imposed the New Orleans Conditions which import the Washington Agreement. Docket No. 27 is not subject to such a distinction. In Docket No. 64 the Carrier argued that applicability of the Washington Agreement both under the authority of Docket No. 27 (deciding that Section 5(2)(f) and the Agreement coexist) and that the ICC-imposed conditions included the Washington Agreement. My decision was based upon the former ground.

The interplay of the Washington Agreement and the Railway Labor Act must be understood. The Agreement was designed to facilitate mergers, consolidations, and the like but on stated conditions (notice, implementing agreement, benefits to those adversely affected). The Railway Labor Act prevents either carriers or unions from making unilateral changes in those agreed provisions; the Agreement also has limits upon the termination of its applicability. Hence when a merger etc. is undertaken before the required steps to end the Agreement are taken this Agreement binds the union to permit the job combinations required by the merger and requires the carriers involved to follow its procedures and accord its benefits. The recognition given the Washington Agreement in the last sentence of Section 5(2)(f) indicates that Congress regarded such a private contractual arrangement as harmonious with the ICC power to impose employee protective conditions. That provision should be read with Section 5(11). The recognition and encouragement thereby accorded the Agreement argues

that it is not overridden by Section 5(2)(f) nor is the protection accorded to the Agreement by Section 6 of the Railway Labor Act vitiated.

After the Section 13 Committee's hearings and executive sessions the Southern submitted a memorandum citing, for the first time,[3] authorities which arguably would lead to a different conclusion. While language in all of them indicates the broad scope of Section 5(11), the differing contexts and issues of the cited cases and this set of cases involving the Southern and Central of Georgia must be taken into account. Texas v. United States, 292 U.S. 522, 533-34 (1934) and Schwabacher v. United States, 334 U.S. 182, 200, 201 (1947) are hardly opposite. Kent v. CAB, (2d Cir. 1953) 204 F2d 263, is put forward for the proposition that federal agency power in carrier merger cases extends to overriding private collective agreements. The court there dealt with the CAB's power which it likened to that of the ICC; it also compared the CAB's power to override a collective agreement dealing with the normal subjects of such contracts with the way in which collective agreements take precedence over individual contracts of employment under the National Labor Relations Act—an example of how a court may blur innumerable differences which are apparent and important to those familiar with the many peculiarities of labor relations and agreements in different fields (to say nothing of the many differences in the applicable statutes) and parlay them into possibly unwaranted propositions. Among the many differences in the situations discussed in that case and this group of cases is that the last sentence of Section 5(2)(f) explicitly provides for the concurrent existence, and there-

[3] I have received and considered all the material and arguments submitted by the parties no matter how late in the proceeding some of it was submitted. Certain material does not require extended comment, e.g., copies of letters from the Commission's Congressional Liaison Office, the Commission chairman and other commission officials purporting to show that certain parts of the Washington Agreement were not included in the Commission's orders. Their probative value seems negligible.

by operative effect, of private agreements providing employee protection and ICC-imposed conditions.

Brotherhood of Locomotive Engineers v. Chicago and N.W. Ry. Co., (8th Cir. 1963), 314 F.2d 424, dealt with a railroad merger situation in which the parties agreed that a somewhat modified version of the Washington Agreement provided "a fair and equitable arrangement for the protection of interests of such employees as provided in Section 5(2)(f) . . ." and the Commission adopted the agreed upon arrangements in its order approving the purchase of one carrier's facilities and rights by another looking to the coordination of some facilities. The acquiring carrier gave the required Section 4 notice and sought to negotiate an implementing agreement. The carrier sought arbitration when negotiations stalled in the face of a union contention that the coordination constituted changes in rules which could only be accomplished under the procedures prescribed by the Railway Labor Act for such changes. In this context the court held that Section 5(2)(f) displaced the requirements of the Railway Labor Act. Quite apart from the dubious reliance upon Kent v. CAB for that conclusion, the case does not present any conflict between Section 5(2)(f) and the Washington Agreement. Indeed it was a modified version of the Agreement concluded by the parties that was being enforced under Section 5(2)(f); no challenge to the last sentence of Section 5(2)(f), validating private employee protective agreements, was involved. (N.B.: The Court's caution that "We limit our decision to the peculiar factual situation of the present case." 314 F.2d at 434.) These cases, then, do not lead to the conclusion that Section 5(2)(f) displaces the Washington Agreement.

The Section 13 Committee has processed many cases involving the New Orleans and other conditions and innumerable implementing agreements under the Washington Agreement have been concluded despite the prior issuance of ICC orders imposing various protective con-

ditions. This pervasive and consistent conduct is at odds with the Carriers' assertion that the Washington Agreement is a nullity.

Congress did override the Railway Labor Act when the dispute over firemen and crew consist did not respond to innumerable emergency boards and a presidential commission and threatened a national tie-up of rail transportation. Only then did the President propose and Congress reluctantly provide that a public agency (other than the Commission as originally proposed by the President) impose terms of employment. It approaches the absurd to entertain the notion that essentially the same thing happened *sub silentio* in the 1940 enactment of Sections 5(2)(f) and 5(11) where no such crisis had existed, no bargaining stalemate had occurred, and no stoppage impended.

The background and purpose of the Washington Agreement and Section 5(2)(f) differ. The first is a voluntary national collective bargaining agreement which stems from the peculiar nature of railroad rules agreements—it is the key which unlocks the rules preventing transfer and consolidation of work. Section 5(2)(f) is a statutory requirement which comes into play when carriers seek governmental permission to merge facilities. It is the price imposed by government for such permission in the interest of balancing employee interests with those of carriers and the public.[4] In seeking that permission carriers do not seek relief from another private agreement; they accept the Commission's terms for the grant of government permission to take certain steps.

[4] "Nor do we perceive any basis for saying that there is a denial of due process by a regulation otherwise permissible, which extends to the carrier a privilege relieving it of the cost of performance of its carrier duties, on condition that the savings be applied in part to compensate the loss to employees occasioned by the exercise of the privilege." United States v. Lowden, 308 U.S. 225, 240 (1939) speaking of the predecessor provision of Section 5(4)(b). The Court equated Section 5(4)(b) with the then pending bills which brought forth Section 5(2)(f).

While typically employee organizations intervene, they do so to avert actions which they believe will shrink employment opportunities and to maximize the protections afforded employees. The protective conditions granted often are superior in many respects to those in the Washington Agreement balanced off in some degree by somewhat more restrictive details. Because of this they usually have been accepted, even if more favorable conditions were sought from the Commission or the courts. No Commission action indicates an attempt to abrogate the Washington Agreement, although some of its conditions adopt the Washington Agreement with minor modifications. I doubt that the Commission could override the Washington Agreement if it wanted to; it can order higher benefits and impose them upon the carriers as the price of approving what they seek; but a more compelling showing of Congressional intention is required to obliterate a nationwide collective agreement not objected to by either management or labor—or, indeed any governmental agency—and supersede it with governmentally imposed conditions. More than two decades of conduct by railroad management and unions and by the Commission belie such a result. As the Commission noted in its announcement of February 17, 1964, (320 I.C.C. 377) in this case: it did not intend to supplant the Washington Agreement and, indeed, its protective orders have been patterned after that agreement. The Southern argues that the ICC (despite what it said in its 1964 statement) meant its arbitration provisions to displace those provided by Section 13 of the Agreement and offered the following quotation from the Commission (317 ICC 566):

> The possibility also exists that a carrier will refuse to accept arbitration procedures under paragraph 8 and require employees to invoke the provision of section 13 of the Washington Agreement, which involves a permanent committee whose decisions may be subject to protracted delay after a claim is made. In our opinion, fairness and equity

require adoption with some modification, as hereinafter set forth, of the condition urged by the association with respect to arbitration, which will make mandatory the submission to binding arbitration of disputes not settled by agreement between the carrier and the employee.

This language seems to say that the Section 13 Committee arbitrament is available but might be too slow, hence the Commission was providing an arbitration provision thought to be superior. This is quite different from saying that the Section 13 Committee procedure was to be superseded. Moreover, it hardly seems likely that the Commission would have concerned itself with Section 13 if it did not believe that the remainder of the Washington Agreement applied, for otherwise the Section 13 Committee would have no authority to act.

Given the preferred position of collective bargaining in nationwide agreement which provides for negotiation of employment aspects of mergers, (and provides its own machinery for averting deadlocks (See Docket No. 70)) it seems entirely unlikely that the Washington Agreement was cast aside by Congress without specific mention of the fact. This conclusion is all the stronger for the fact that the notice and implementing agreement provisions have proved workable again and again in coordinations between carriers where ICC protective conditions had been issue.

Carrier Members urge that two court proceedings concerning this controversy have led the parties back to the ICC and that its decision should be awaited. In companion cases,[5] the Court of Appeals for the Fifth Circuit declined to rule preferring to have the issue determined preliminarily by the ICC pursuant to the earlier remand of another case by the Supreme Court. The Supreme

[5] Switchmen's Union v. Central of Georgia R. Co., 341 F2d 213 (1965); Brotherhood of Railway Clerks v. Southern R. Co., 341 F2d 217 (1965).

Court of the United States[6] remanded the other case to the district court with instructions to have it remanded to the Commission with instructions "to amend its reports and order as necessary to deal with appellants' [a union's] request that Sections 4, 5, and 9 be included as protective conditions, specifically indicating why each of these provisions is either omitted or included. See United States v. Chicago, M. St. P. & Pac. R. Co., 294 U.S. 499, 511." (The cited case was decided in 1935, before the Washington Agreement, and does not deal with it; it does deal with the requisites of an appellate record where agency action is contested.) Both courts indicated they sought clarification of what the ICC had ruled and why. While the ICC's view of the impact of Sections 5(2)(f) and 5(11) undoubtedly would be influential with the courts, there is no certainty that the Commission will reach that issue. The Court's order seems to require the Commission to explain whether its conditions included certain parts of the Agreement or not and to explain the inclusion or omission; the issue before this Committee may not be dealt with by the Commission. The special history and experience of this Committee and the history of dealings by signatories to the Washington Agreement (some of whom played leading roles in the enactment of the 1940 provision) upon which this decision rests would seem to impart importance to the disposition of the issue of the interrelationship of the Agreement and Section 5(2)(f) in *this* proceeding. The Carriers raised the issue; the Committee is obliged to discharge its functions as best it can.

Southern's letter of July 12, 1966 submitted a copy of motion papers in Gary v. Midland Valley R.R. Co., Civ. No. 5995, (D.C.E.D. Okla) which include a memorandum by the attorney for some of the Organizations contrasting the New Orleans and Southern-Central conditions and declaring the inferiority, from the employees' view-

[6] Railway Labor Executives' Association v. United States 379 U.S. 199 (1964).

point, of the latter to the former. However, even if that analysis is accurate, it does not reach the issue before the Committee—whether the Washington Agreement is vital and applicable despite Section 5(2)(f) of the Act and Commission orders issued pursuant to it. I did not construe the ICC conditions in my draft opinion nor in this final opinion. This opinion is addressed to the interaction of the Act, Commission orders and the Agreement. If the Commission decides that its orders comprehended the notice and implementing agreement provisions of the Washington Agreement and if that decision is sustained, that would be one basis upon which the Agreement is applicable. That is not the basis of this ruling. Rather, the ruling that the Washington Agreement applies is that the background, purpose, and language of Section 5(2)(f) all maintain its operative force, as do the precedents and conduct of this Committee.

For all of these reasons, I conclude that the Washington Agreement was not abrogated nor modified by Sections 5(2)(f) or 5(11) or the ICC orders in Finance Docket No. 21400. Therefore, the Carriers violated the Washington Agreement by putting coordinations into effect without observing the important requirements of Sections 4 and 5. They therefore must (1) compensate employees for any loss of regular compensation or fringe benefits and (2) must give the requisite notices and negotiate the required implementing agreements. Until that is done employees are entitled to full compensation and fringe benefits as if the jobs had not been abolished. Docket No. 106.

When implementing agreements are achieved Washington Agreement benefits will extend through September 15, 1968 (five years from 90 days after June 17, 1963—the point in time when the Carriers, had they fulfilled their obligations, might have been able to expect that an implementing agreement should have been achieved). Indeed, that presumption favors the Carriers.

However, until they do negotiate such an agreement (or this Committee writes one in the event of a deadlock) the Carriers can hardly expect to pay the less than total compensation this Agreement allows to those who observe it. The effect of coordination upon any individual employees is to be determined as of the date such effect occurred. However, such an individual will be entitled to the equivalent of undiminished earnings until an implementing agreement is achieved,[7] after which the allowances payable under the Agreement shall go into effect. They are to be computed on the basis of the date of actual effect.

As to the portion of the decision ordering the Carriers to give the Section 4 notices and negotiate Section 5 implementing agreements, Carriers argue that such an order (1) exceeds the Referee's authority, (2) goes beyond the questions posed, and (3) is unrealistic in view of the many changes made since the coordinations were in fact begun in June 1963. As to (1) and (2), the discussion in Docket No. 106 is pertinent. As to (3), the notices and implementing agreements, of course, must take into account intervening events. But this is quite different from saying that where the parties have contracted to agree upon implementation, a *fait accompli* by the Carriers deprives the Organizations of their contractual rights. The Organizations may persuade the Carriers that other arrangements than those unilaterally made are desirable; in case of deadlock, the Committee may be persuaded or prescribe some other arrangement. That the Carriers' actions and resulting employee relocations, "releases," resignations and the like, may make implementing agreements more difficult to arrange may be a fact of life, but it is no excuse for scrapping integral parts of the Agreement. The Agreement must be observed.

* * * *

---

[7] The Carriers will, of course, be given credit for any wage or benefit payments employees had received.

APPENDIX E

Former Section 5(12) since recodified in 49 U.S.C. § 11341(a)

(12) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

APPENDIX F

Regional Rail Reorganization Act of 1973,
45 U.S.C. § 701, *et seq.* (Relevant Excerpt)

Section 503, 45 U.S.C. § 773 (repealed)

The Corporation shall have the right to assign, allocate, reassign, reallocate, and consolidate work formerly performed on the rail properties acquired pursuant to the provisions of this Act from a railroad in reorganization to any location, facility, or position on its system provided it does not remove said work from coverage of a collective-bargaining agreement and does not infringe upon the existing classification of work rights of any craft or class of employees at the location or facility to which said work is assigned, allocated, reassigned, reallocated, or consolidated and shall have the right to transfer to an acquiring railroad the work incident to the rail properties or facilities acquired by said acquiring railroad pursuant to this Act, subject, however, to the provisions of section 508 of this title.